ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My client insists that we use a private investigator to "dig up" dirt on his adversary to use in our litigation. I certainly can see the benefits of doing so, but I'm also concerned about the ethical pitfalls and my obligations with respect to a third-party over whom I may not have control. What are the ethical issues I should be aware of? Should I have my client retain the private investigator? Would that protect me if the private investigator goes AWOL? Am I responsible in any way for the private investigator's actions if her or she is taking directions from my client and is not adhering to the guidelines I provide? How do I protect myself?

Sincerely,

A.M. I. Paranoid

Dear A.M. I. Paranoid:

In many circumstances, hiring a private investigator may be beneficial to, *inter alia*, help you gather useful information that may strengthen your case. Moreover, the use of a private investigator offers certain protections. For example, although you may be tempted to investigate some underlying facts yourself, a private investigator can help prevent a situation where you inadvertently become a witness on a significant issue in your case and have to resign as counsel as a result. *See* New York State Rules of Professional Conduct (RPC) 3.7. There are, however, myriad legal and ethical considerations you must consider when working with a private investigator. Many of those issues frankly merit separate treatment. Nevertheless, we will try to briefly touch upon the main legal and ethical issues raised by your question.

The first issue that should be addressed is privilege. A private investigator's work and communications may be protected under both attorney-client privilege and work-product privilege. In *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), the seminal case on this subject, the Second Circuit ruled that the attorney-client privilege may extend to communications with a private investigator hired to assist the attorney in representing the client. *Kovel*, 296 F.2d at 922; *see In re Grand Jury Proceeding*, 79 Fed. Appx. 476, 477 (2d Cir. 2003). "Like any communications protected by the attorney-client privilege, however, communication with such third-party agents is only protected if it is 'made in *confidence* for the purpose of obtaining *legal* advice *from the lawyer.*'" *In re Grand Jury Proceeding*, 79 Fed. Appx. at 477, citing *Kovel*, 296 F.2d at 922 (emphasis in original). Similarly, documents prepared in anticipation of litigation by a private investigator are also protected by the work-product privilege. *Costabile v. Westchester, New York*, 254 F.R.D. 160, 164 (S.D.N.Y. 2008). But there are limits to the application of both privileges and they can be lost for several reasons. *See, e.g.*, *Meyer v. Kalanick*, 15 CIV. 9796, 2016 WL 3981369, at *5 (S.D.N.Y. July 25, 2016) ("there is a 'crime-fraud' exception to the work-product doctrine, as there is to the attorney-client privilege" and declining to apply the work-product doctrine where a party's investigation included "fraudulent and arguably criminal conduct"); *Spanierman Gallery v. Merritt*, 00 CIV. 5712, 2003 WL 22909160, at *2–3 (S.D.N.Y. Dec. 9, 2003) (holding that work-product immunity is waived when its production to another is inconsistent with the protection).

Privilege questions aside, the next issue involves an attorney's ethical obligations and responsibilities when engaging a private investigator. If you or your clients utilize the services of a private investigator for your case, and you use the information in the litigation, you can be held responsible for the private investigator's conduct. Under RPC 5.3(b)(1), "[a] lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer *that would be a violation of these Rules if engaged in by a lawyer*, if: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it." RPC 5.3(b)(1) (emphasis added). In Professor Roy Simon's annotation on RPC 5.3(b), he notes that the "category of nonlawyers 'associated with' the law firm should include all nonlawyers who are working side by side with the law firm on a matter, even though the law firm itself did not retain them." Roy D. Simon & Nicole Hyland, Simon's New York Rules of Professional Conduct Annotated 1412 (2016 ed.). Professor Simon specifically identifies a private investigator in an example of RPC 5.3(b), noting that this provision would apply where "a private investigator may be investigating a defendant on behalf of multiple plaintiffs." *Id*.

When considering whether you are ratifying a private investigator's conduct, Professor Simon states that "any lawyer who learns of misconduct after the fact and then takes advantage of that misconduct (or simply lets it slide) may be found to have ratified the misconduct." *Id.* at 1390, 1413. Recently, a federal court in the Southern District of New York dealt with this issue and

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stated that the RPC "require lawyers to adequately supervise non-lawyers retained to do work for lawyers in order to ensure that the non-lawyers do not engage in actions that would be a violation of the Rules if a lawyer performed them." *Meyer v. Kalanick*, 15 CIV. 9796, 2016 WL 3981369, at *7 (S.D.N.Y. July 25, 2016). This opinion is also consistent with RPC 8.4(a), which prohibits an attorney from knowingly assisting or inducing another person to attempt to violate the RPC through another person's actions. RPC 8.4(a). However, ensuring that private investigators do not engage in actions that would violate the New York Rules of Professional Conduct, if performed by a lawyer, can be a significant undertaking particularly where those investigators are being paid directly by a client who demands certain results and actions.

One aspect of a private investigator's practice that warrants extra scrutiny and consideration is where a private investigator makes misrepresentations to an adversary or unrepresented witness in an attempt to gain information. This is known as "pretexting." While one might think that pretexting is not an unexpected business practice, our profession is held to a very strict standard. RPC 8.4(c) specifically precludes attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation" and RPC 4.1 states that, "a lawyer shall not knowingly make a false statement of fact or law to a third person." RPC 4.1; 8.4(c). This includes, for example, situations where a witness inquires as to whom the investigator represents. In such a situation, the investigator should disclose the relationship. RPC 8.4(c); *see* NYSBA Comm. on Prof'l Ethics, Op. 402 (1975) [if "inquiry is made by the witness as to whom the investigator represents, he should, of course, disclose the lawyer-principal"].

In addition, RPC 4.2 prohibits an attorney from "communicat[ing] or caus[ing] another 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 prior consent of the other lawyer or is authorized to do so by law." RPC 4.2. Each communication between a private investigator and a potential witness, adversary, or agent of an adversary, creates a potential breach of these rules and consequently requires consideration and discussion with the private investigator before he or she interacts with any potential witness.

Online social media websites have become a valuable source of evidence in litigation, and "friending" a potential witness or adversary could give a private investigator access to significant amounts of information without ever having to leave the office. An ethics opinion addressed whether a private investigator could "friend" an unrepresented potential witness on a social networking website to gain access to information helpful in litigation. N.Y.C. Ass'n B. Comm. Prof. Jud. Eth., *Obtaining Evidence From Social Networking Websites,* N.Y.C. Eth. Op. 2010-2, 2010 WL 8265845 (2010). In its opinion, the Committee on Professional and Judicial Ethics concluded that as long as a private investigator used his or her real name and profile to send the friend request, even without disclosing the reason for making the request, it would not cross any ethical boundaries. (*Id.*). The opinion noted, however, that a private investigator may not use deception to obtain information from a social networking site under RPC Rules 5.3(b)(1) and 8.4(a). *Id.*. This opinion is consistent with a Court of Claims' decision in which a private investigator interviewed Department of Transportation employees who were likely witnesses after a notice of intention was served against the state, but before the action was commenced, and the attorney general had not provided the low-level employees with any privileged information about the subject matter of the case. *Schmidt v. State*, 181 Misc. 2d 499 (Ct. Cl. 1999), *aff'd*, 279 A.D.2d 62 (4th Dep't 2000). The court in *Schmidt* ruled that the employees were not represented by an attorney when the private investigator interviewed them and the court denied the motion to suppress the statements and disqualify the claimant's counsel. *Id.*.

Like most rules, courts may sometimes make exceptions where public policy interests supersede the rote application of the rules. Where there is a strong public policy in deterring activity that may escape discovery without the use of undercover investigatory techniques, one court refused to preclude evidence even where a private investigator made misrepresentations to an employee of a party represented by counsel in obtaining evidence. In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999), a private investigator posed as an interior designer and recorded interactions with furniture sales clerks in an effort to gather evidence that the defendants engaged in "bait and switch" tactics in violation of the Lanham Act and the common law in New York. *Id.* at 120–21. Even though the defendant corporation was known to be represented by counsel, and the clerks were deemed parties, the court found that because the sales clerks were not *tricked* into making statements that they would not have otherwise made in the course of their regular business routine, there were no ethical violations. *Id.* at 125–26. The court noted:

> To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general. Furthermore, excluding evidence obtained by such investigators would not promote the purpose of the rule, namely preservation of the attorney/client privilege.

Id. at 122.

The public policy interest in allowing undercover investigations was also cited in an action where the court permitted the admissibility of covert audio recordings made by a private investigator, without misrepresentations, demonstrating that a supervisor

used racial slurs in a racial bias suit. *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 407 (Sup. Ct., Kings Co. 2003). In *Mena*, the court reasoned that "weighed against th[e] ethical imperative" of "insuring that all [members of the public] are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin," the attorney's involvement in the undercover recording did not warrant the suppression of evidence or the disqualification of counsel. (*Id.* at 407).

This narrow public policy exception, however, is unlikely to expand to all situations where, as your client might hope, a private investigator seeks to merely "dig up dirt" on an adversary. In the Southern District of New York's recent decision in *Meyer*, the court held that evidence obtained by an unlicensed private investigator, through the use of materially false statements, made with the intent to gain personal information about the plaintiff and his counsel, was enjoined. *Meyer*, 2016 WL 3981369, at *10. The issue of sanctions was obviated by the parties reaching a publicly undisclosed agreement to pay a reasonable reimbursement of attorney fees and expenses by the investigating party. *Id.*. The *Meyer* court distinguished the *Gidatex* holding because, in *Meyer*, the undercover investigation was not focused on the misconduct at issue in the lawsuit and instead focused on the personal investigation of the party and his counsel. *Id.*. Despite the numerous clear distinctions in the manner and purpose of the investigations in *Gidatex* and *Meyer*, the court went on to reject the holding in *Gidatex* and the proposition that "investigators working on behalf of a party to litigation may properly make misrepresentations in order to advance their own interest vis-à-vis their legal adversaries." *Id.*.

Another common investigative technique that can be fraught with ethical and legal implications is an investigator's recording of communications. In New York State, it is not a crime to record a conversation without the knowledge or consent of the other person. *See* New York Penal Law § 250.00, *et seq.*; *Gidatex, S.r.L.*, 82 F. Supp. 2d at 121. As noted by the court in *Mena*, "[c]ontemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures so long as the law of the jurisdiction permits such conduct." *Mena*, 195 Misc. 2d at 404–05, citing ABA Comm. on Ethics & Professional Responsibility Formal Op 422 (2001); New York County Lawyers' Ass'n Comm. on Professional Ethics Op. 696 (1993). Accordingly, an investigator's in-person recording of a conversation within New York State will be permissible even without the other person's consent. Many states, however, require both parties' consent to record conversations. *Meyer*, 2016 WL 3981369, at *8. Phone conversations with an individual in a two-party consent state can be much more complicated. Whereas many communications are on cellphones, and it may be unclear as to where part of a conversation is taking place, a number of conflict of law scenarios can arise. Suffice it to say, if the investigator is recording communications where there is a likelihood of interstate communications, some research of the legality of the recordings is advisable. Under CPLR 4506, evidence obtained in violation of Penal Law 250 for wiretapping and eavesdropping would be inadmissible. Evidence obtained by unethical or unlawful means, absent specific legal authority, however, may still be admissible. *See Gidatex*, 82 F. Supp. 2d at 126, citing *Stagg v. N.Y. C. Health & Hosp. Corp.*, 162 A.D.2d 595 (2d Dep't 1990) (admitting testimony allegedly in violation of ethics rule and finding, "even if the matters to which the investigator testified were unethically obtained, they nevertheless would be admissible at trial. New York follows the common law rule that the admissibility of evidence is not affected by the means through which it is obtained. Hence, absent some constitutional authority mandating the suppression of otherwise valid evidence [ ], such evidence will be admissible even if procured by unethical or unlawful means").

It is important to supervise and stay informed of the private investigator's methods for obtaining information as the private investigator is prohibited from revealing your client's confidential information and from improperly inducing witnesses to change their testimony. Under General Business Law § 82 (GBL), a licensed private investigator "shall not divulge to any one other than his employer, or as his employer shall direct, except as he may be required by law, any information acquired by him during such employment in respect of any of the work to which he shall have been assigned by such employer." Similarly, you have an obligation under the RPC to use reasonable care to prevent the private investigator from disclosing the confidential information of your client. RPC 1.6(c). It is highly likely that the private investigator will communicate with other people in the course of the investigation. You should be very clear with your investigator what information her or she is able to reveal in his or her discussions.

Additionally, an overzealous private investigator may be inclined to cross a line in investigating a matter and inadvertently attempt to persuade a witness to change his or her testimony. This would likely violate RPC 3.4(b) and possibly the Penal Law's prohibition on tampering and intimidation of a witness. *See* NYSBA Comm. on Prof'l Ethics, Op. 402 (1975) (The opinion notes that "[c]are must be taken . . . that the investigator not offer any improper inducement to persuade the witness to change the testimony previously given"); RPC 3.4(b) ("A lawyer shall not . . . offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony"); Penal Law § 215, *et seq.* (this section of the Penal Law addresses the prohibition of tampering and intimidation of witnesses).

The manner in which private investigators are compensated must also be given close attention. Under GBL § 84, it is unlawful for a licensed

private investigator to perform services on a contingent basis or based upon the result achieved. As a result of this provision, and a number of Rules of Professional Conduct, neither you nor your client may compensate a private investigator on a contingent fee basis or based upon the result the private investigator obtains. (*See* RPC 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent"); 8.4(a); 3.4(b); N.Y.C. Assn. B. Comm. Prof. Jud. Eth., NYC Eth. Op. 1993-2 , 1993 WL 765495 (1993)). Similarly, a lawyer cannot engage in fee-sharing with a nonlawyer. RPC 5.4(a); *see In re Friedman*, 196 A.D.2d 280 (1st Dep't 1994).

Attorneys may, however, advance the fees of a private investigator, make the repayment by the client contingent on the outcome of the case, and charge actual interest incurred for the expenses. Specifically, RPC 1.8(e)(1) provides that "a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." Professor Simon notes that "expenses of litigation" include the "fees of a private investigator." (Simon, *Simon's New York Rules of Professional Conduct Annotated*, p. 543; *see* NYSBA Comm. on Prof'l Ethics, Op. 1044 (2014)). To the extent that a lawyer incurs interest charges for the advanced fees in a contingent fee action, the client may be charged for interest actually incurred by the lawyer if it is explained to the client in advance, including the method by which the rate of interest is calculated, and it is agreed upon by the client in writing. RPC 1.5(c); N.Y.C. Ass'n B. Comm. Prof. Jud. Eth., NYC Eth. Op. 1997-1, 1997 WL 1724481 (1997). You must also retain proof of payments to private investigators for seven years. RPC 1.15(d)(1)(vi).

In summary, utilizing a licensed private investigator can be very helpful to both you and your client if the investigation focuses on the issues that are the subject of your litigation. It is inadvisable, however, to bury your head in the sand when it comes to the private investigator's actions as they can have severe repercussions for you, your firm, and your client. A *Kovel* letter establishing the terms of the private investigator's engagement to you at the outset of the litigation is advisable. This can help you to preserve attorney-client and work-product privilege, establish how you want the investigator to communicate with you, make it clear that the investigator does not disclose confidential information to anyone else, and raise any potential legal or ethics issues that you believe might be relevant in the investigation. If you believe that your investigator is acting unethically or in violation of the law, it is certainly advisable that, at a minimum, you end your engagement with the private investigator.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I work for a governmental agency. We recently held a training workshop for our junior staff attorneys pertaining to trial advocacy. The attorneys were required to cross-examine witnesses, and give opening and closing statements as part of the training. After their closing statements, they received feedback from me as well as other senior staff attorneys. After one of the junior attorneys had concluded his summation, one of my colleagues critiqued him as follows: "You did a great job, but next time try to turn down the gay. A jury is not likely to react positively to it." The junior attorney is openly gay. I watched his reaction and he was visibly upset and taken aback by the comment. As his supervisor, I'm deeply concerned about how to address this situation. One the one hand, my senior colleague was trying to provide constructive feedback because jury bias toward counsel may clearly have an effect on the outcome of a case. On the other hand, my colleague's comments could be construed as being highly offensive and insensitive, if not discriminatory. How should I, as a supervisor, be addressing this issue internally with my colleagues and with the junior attorney? Do I have an obligation to do something? And if so, how do I approach the issue without exposing my team to liability?

Sincerely,

A. M. AWKWARD

In Memoriam

Ronald E. Feiner
New York, NY

Myron Fishbach
Stamford, CT

William L. Fox
East Greenbush, NY

Francis S.M. Hodsoll
Falls Church, VA

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