On the Ethical Use of Private Investigators

Forrest Plesko
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INTRODUCTION

As a civil litigation attorney practicing primarily insurance defense, I have often retained the services of private investigators. Sometimes their services make a significant difference in the outcome of a case. A few years ago, for example, one plaintiff stated in an interrogatory answer that the activity he would miss most as the result of his alleged injury was the ability to wash and wax a classic car he had restored over the years. Suspicious of his claims, I sent an investigator to take a few hours of video of him. The investigator captured about four hours of video showing this plaintiff shirtless in his driveway eagerly washing, diligently waxing, and meticulously polishing his classic car. This required repeated bending, stooping, and crouching—all of which he claimed he could not do as a result of his alleged injury. Such evidence has clear value in the context of personal injury litigation.

But attorneys must carefully scrutinize their investigators’ techniques and tactics in order to avoid violating the Model Rules of Professional Conduct1 and potentially subjecting themselves and their clients to civil liability. It is not that investigators are unscrupulous and need to be micromanaged; rather, it is that some of their techniques may not be consistent with the rules attorneys must observe. In this article I first explore a number of common techniques used by investigators and next discuss the ethical and other implications for attorneys who hire them. I conclude by recommending strategies attorneys can employ to maximize the probability that they will not, due to the conduct of their investigators, face an ethical sanction or other liability.

I. ETHICAL IMPLICATIONS FOR ATTORNEYS

The Model Rules of Professional Conduct and their interpretation by courts, bar associations, and commentators provide guidance for attorneys on the common investigative techniques discussed below. There

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1. The Model Rules of Professional Conduct have been substantially adopted by 42 jurisdictions. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS & MATERIALS 13 (9th ed. 2006). Each state regulatory body, of course, may have differing interpretations of the rules and therefore a practitioner utilizing this article must consult his own jurisdictional rules with regard to the propriety of conduct in that jurisdiction.
are three rules that are particularly relevant: Model Rules 4.1, 5.3, and 8.4.

Model Rule 4.1 prohibits an attorney, in the course of representing a client, from knowingly making a false statement of material fact or law to a third party.\(^2\) According to the comments, a misrepresentation in violation of Model Rule 4.1 occurs “if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false” or “by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”\(^3\)

Model Rule 5.3 requires that a lawyer supervise his or her nonlawyer employees and makes the lawyer ethically responsible for the activities of those employees.\(^4\) The rule is written broadly and, as such, appears to apply to not only employees but to independent contractors and those “associated with” the lawyer as well.\(^5\) Therefore, to the extent an investigator is an independent contractor for a lawyer, or even doing a personal favor for a lawyer, Model Rule 5.3 likely still makes the lawyer ethically responsible to supervise the investigator’s conduct.\(^6\)

Model Rule 8.4 states that it is professional misconduct for a lawyer to knowingly assist or induce another to violate the Model Rules of Professional Conduct or do a prohibited act through another.\(^7\) Put simply, “lawyers cannot do through third parties (such as investigators or paralegals) what they cannot do themselves under the rules.”\(^8\) Model Rule 8.4 further states that it is professional misconduct for a lawyer to engage in conduct involving, *inter alia*, deceit or misrepresentation.\(^9\) Courts and bar associations have defined deceit and misrepresentation broadly, with some jurisdictions indicating that either a false representation or an omission that could have influenced the hearer’s decision-making process are sufficient to violate the rule.\(^10\)

### II. Common Techniques Used by Private Investigators and the Model Rules of Professional Conduct

The techniques of private investigators, like the techniques of any professional, are constantly evolving. However, there are a number of

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3. Id. cmt.1.
6. Id. at 450 (“Lawyers generally cannot escape discipline under Rule 5.3 on the ground that an errant assistant was an independent contractor rather than an employee.”).
common techniques often suggested by investigators which present ethical and other problems for attorneys. I have chosen to discuss four: surveillance video, pretexting, social media, and GPS tracking. This list is by no means exhaustive and there are numerous other investigative techniques which could pose similar problems, but these four are quite common in the context of personal injury litigation.

Surveillance Video

At least in the context of personal injury litigation, where plaintiffs are making claims of physical injury and disability, surveillance video is one of the most commonly requested services of private investigators. The techniques for obtaining surveillance video are myriad. It can be as simple as the investigator parking his vehicle across the street from the plaintiff’s home and watching for activity. If the plaintiff comes into view, the investigator simply begins taking video. Of course, there are much more sophisticated ways to obtain surveillance video of a plaintiff. Investigators often have portable cameras which can fit into innocuous objects such as glasses, hats, neckties, and others. This allows investigators to, for example, follow the plaintiff into a store and obtain video of what he is doing. I once defended a personal injury case where the plaintiff claimed that, due to an alleged shoulder injury, she could not raise her right arm past mid-chest. An investigator followed this plaintiff through a department store, however, and obtained video of her using her right arm to raise up sweaters, jackets, and coats in order to get a better look at them. She not only raised her arm past mid-chest dozens of times, but was also picking up relatively substantial clothing items while doing so. This video was later utilized as impeachment evidence at her deposition.

Obtaining surveillance video of a plaintiff in a public place such as outside the home or in a department store does not, in and of itself, appear to present lawyers with any difficulties under the Model Rules of Professional Conduct. The investigator does not initiate contact with plaintiffs and does not initiate contact with him or view his property in order to obtain the video. Objection to investigation is tantamount to admission of the truth of the photograph, video, or other evidence obtained.


the plaintiff and, so long as the investigator maintains a low profile, the plaintiff is not even aware of the investigator’s presence.\textsuperscript{15}

Should an investigator wish to get more aggressive, however, and begin utilizing a telephoto lens to peer into the windows of a plaintiff’s home or a remote-controlled drone to peer into a plaintiff’s fenced yard, then a lawyer’s professional responsibilities may be implicated. First, there is a question of whether such aggressive tactics are legal, and whether they present tortious conduct which could create civil liability for the lawyer and his client.\textsuperscript{16} No lawyer would want to explain to his client why the client is being sued under the theory of \textit{respondeat superior} for the tortious invasion of the plaintiff’s privacy. Second, there is a question of whether such aggressive tactics violate Model Rule 4.4, which requires that a lawyer not engage in activities to embarrass, burden, or violate the legal rights of a third person.\textsuperscript{17} Taking video of a plaintiff in a private place, such as inside his home or within his fenced yard, may constitute a sufficient embarrassment and violation of legal rights to lead to an ethical sanction. As is discussed in further detail below, an attorney should clarify with his investigator the reach of any proposed video surveillance prior to sending the investigator out on the assignment. In this way there is a reduced potential for misunderstandings between the lawyer and investigator of the acceptable limits.

\textit{“Pretexting”}

Private investigators often want to use “pretexting” to obtain information about a party to a litigation.\textsuperscript{18} The practice of pretexting “generally involves disguising one’s identity and purpose when approaching a target to obtain potentially significant information.”\textsuperscript{19} A common example of pretexting is to determine if the plaintiff is in fact in the location he is suspected to be in so that surveillance video may be more efficiently obtained. The investigator will call the plaintiff on the telephone and pretend to be a solicitor or some other random caller. Some investigators

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\textsuperscript{15} One story which I heard second-hand involved an investigator obtaining surveillance video on a plaintiff who was allegedly blinded by an injury. The investigator (so the story goes) set up a camera and then, as the plaintiff was walking down a city street, dropped a handful of quarters in the plaintiff’s path. When he reached the quarters the plaintiff stopped and picked them up. The investigator did not make any contact with the plaintiff, and did not make any misrepresentation to him. He simply set up a situation which the plaintiff literally walked into. It therefore appears that the investigator’s conduct in this instance would not violate the Model Rules of Professional Conduct even though he relied on what may be considered subterfuge.

\textsuperscript{16} In \textit{York v. General Electric Co.}, for example, the Court of Appeals of Ohio concluded that surveillance activities outside the home would not rise to the level of invasion of privacy but that using a telephone lens or light enhancing equipment to look inside the home may. \textit{York v. Gen. Elec. Co.}, 759 N.E.2d 865, 868 (Ohio Ct. App. 2001).

\textsuperscript{17} \textsc{Model Rules of Prof’l Conduct} R. 4.4 (2014).

\textsuperscript{18} See Alexander, supra note 14, at 6.

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will pretext in-person by knocking on the plaintiff’s door and offering to sell a fake service. In either case the goal is to confirm the plaintiff’s whereabouts. Additionally, some investigators will call third parties such as the plaintiff’s friends or neighbors under a pretext to obtain information about him.

One oft-marketed service involving pretexting of third parties is a “hospital check” to determine whether a plaintiff has been treated at more hospitals or medical facilities than he has admitted to. Essentially, an investigator will call hospitals pretending to be a representative of another health care provider and try to extract information as to whether there is any record that the plaintiff was ever a patient at the targeted hospital or facility. If there is, the investigator has learned the location of a medical provider whom the plaintiff may or may not have disclosed in discovery.

Attorneys face several potential ethical problems with investigators’ utilization of pretexting. As a preliminary matter, the fact that it is the investigator and not the attorney engaging in the pretexting is irrelevant: pursuant to Model Rule 8.4, it is professional misconduct for a lawyer to knowingly assist or induce another to violate the Model Rules of Professional Conduct, or to do a prohibited act through another.20 Therefore, a lawyer may not ask an investigator to do what the lawyer ethically cannot. The more interesting question is whether pretexting itself violates the Model Rules of Professional Conduct.21

Clearly, an investigator directly calling a represented party on a pretext to determine his whereabouts violates the Model Rules of Professional Conduct. Model Rule 4.2 generally prohibits a lawyer from engaging in direct communication with a represented party.22 Similarly, Model Rule 4.1 prohibits a lawyer, in the course of representing a client, from knowingly making a false statement of material fact to another.23 Between the communication itself, and the false subject of the communication, there is not a legitimate argument that pretexting a represented party passes ethical muster.

But an investigator directly calling third parties on a pretext—such as the plaintiff’s friends, neighbors, or potential medical providers—is a closer question. These third parties are not represented parties, so the prohibitions of Model Rule 4.2 do not apply. Nevertheless, because pre-

21. It should be pointed out that, in many jurisdictions, there are different ethical standards for this issue depending on whether the lawyer is a private lawyer or a government lawyer. This article focuses on private lawyers. However, other articles specifically focus on the ethical standards for government lawyers who are, for example, directing the police to use pretexting or other techniques in a criminal investigation. See, e.g., Kevin C. McMunigal, Investigative Deceit, 62 Hastings L.J. 1377 (2011).
texting necessarily involves false statements of material fact, the prohibitions of Model Rule 4.1 may apply. At what point an investigator’s statements become false statements of material fact, however, has been answered differently by various courts, bar associations, and commentators.

On the one hand, in *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, a federal district court concluded that it did not violate New York’s version of Model Rules 4.1 and 4.2 to send investigators into a represented party’s store and have those investigators engage in and surreptitiously record a pretextual sales discussion with the store’s employees as part of an investigation into the parties’ trademark dispute.24 The court explained that the policy interests behind the rules was to protect parties from being “tricked” in the absence of their own counsel and that the investigators’ misrepresentations did not violate these interests because “[t]he presence of investigators posing as interior decorators did not cause the sales clerks to make any statements they otherwise would not have made.”25 A number of commentators have put forth arguments similar to that made by the court in *Gidatex*.26

On the other hand, in *In re Conduct of Gatti*, the Oregon Supreme Court found it appropriate to sanction a lawyer who called three chiropractors suspected of fraud on the pretext that he was a chiropractor seeking employment with their offices.27 Specifically, the court concluded that the lawyer violated Oregon’s version of Model Rule 4.1 by making false statements to the chiropractors that the lawyer was a chiropractor, worked in the chiropractic field, and was seeking employment as a chiropractor, and for failing to disclose that he was in fact a lawyer seeking to obtain incriminating information from the chiropractors.28 A number of courts and bar associations have taken a similar approach.29

Unless practicing in a jurisdiction where a court or bar association has issued a written opinion specifically permitting the pretexting of third parties, or at least setting forth specific parameters for when the pretexting of third of parties is appropriate, attorneys should be wary of the practice. The information an investigator gleans from a plaintiff’s friends and neighbors may not be all that informative, and in fact may be availa-

25. Id.
27. *In re Conduct of Gatti*, 8 P.3d 966, 973 (Or. 2000).
28. Id. at 973–74.
ble through less intrusive means such as a public records search. Moreover, the information an investigator gleans from so-called “hospital checks” can likely be obtained by a careful review of the medical records provided in discovery, as medical providers are typically diligent about noting a patient’s past treatment providers in their medical history notes. Because there is so little to be gained by pretexting that cannot be gained by other means, and because there is so much uncertainty as to the point at which an investigator’s pretext becomes a false statement of material fact in violation of Model Rule 4.1, the ethical risks to the attorney appear to outweigh the potential benefits to the client.

Social Media

It is well known that social media is a potential goldmine of impeachment evidence. Anecdotes are widespread of plaintiffs posting physical feats to their social media accounts yet claiming they are unable to do even basic life activities, but I will share one from my own experience. A plaintiff made a workers’ compensation claim for permanent total disability as the result of a head injury. She stated that she was unable to do things like shop at a store, sit in a restaurant, or concentrate for more than a few minutes at a time and therefore was unable to work in any capacity for the rest of her life. Two years after the alleged injury, and two months before filing her claim, the plaintiff successfully climbed a notable mountain. While the plaintiff left this climb out of her discussions with the insurance company representatives investigating her claim, her social media made numerous references to it, including a picture of her at the summit. The plaintiff’s social media activity was a turning point in the defense of the claim as it provided evidence that her alleged disabilities were not as severe as she claimed. The postings were used extensively to impeach her at trial. Accordingly, social media can be a very powerful litigation tool.

Private investigators, however, often want to do more than simply Google a target’s name and hope for a hit. One firm of investigators, which specializes in social media searches, touts the fact that they have hundreds of fake Facebook, LinkedIn, Twitter, and MySpace accounts, which they utilize to become “friends” with the plaintiff and thereby circumvent the plaintiff’s privacy settings. This allows the investigator to have unfettered access to the plaintiff’s social media postings, including photos and videos. These fake accounts represent a whole range of geographic locations, ages, ethnicities, genders, and social classes. Based on the perceived demographic of the plaintiff, the most appropriate “person” is utilized to make an attempt to become friends with the plaintiff. In the event the plaintiff does not accept the fake person’s friend request, the investigator may be able to use a different fake person to friend a known associate of the plaintiff, thereby gaining at least some increased access to the plaintiff’s profile than could be obtained publicly.
An investigator friending, connecting with, or following the target of an investigation, whether it is a represented plaintiff or even a fact witness, poses a number of ethical issues for an attorney. First, if the target of an investigation is represented, a friend request from a lawyer’s investigator is likely unethical. Model Rule 4.2 prohibits a lawyer or those working for him from communicating directly with a represented adverse party about the subject matter of the representation, absent the consent of the adverse party’s attorney. Depending on the particular social media service, the amount of “communication” may be more or less. For example, is the automated message sent by Facebook or LinkedIn informing the target that someone wants to befriend them sufficient to constitute “communication” with a represented party? At least one bar association has specifically analyzed the question and concluded that it is, and a number of other bar associations have simply assumed that it is. Therefore, it is probable that even an automatically generated request may be considered an unethical communication with a represented party.

Second, bar associations and commentators who have considered the issue generally agree that utilizing a fake account to friend, connect with, or follow a party or witness violates the Model Rules of Professional Conduct. Model Rule 4.1, which prohibits a lawyer from making a false statement of material fact to a third person, is violated by the investigator’s use of a fake name, picture, or whatever other affirmative false representation he may have made with regard to his account. Model Rule 8.4, which prohibits a lawyer from engaging in conduct involving, inter alia, deceit or misrepresentation, is violated by the investigator’s act of passing himself off as another in order to gain access to private information under false pretenses. Thus the use of fake accounts, as described above, is likely unethical.

Third, bar associations considering the issue have come to differing conclusions on whether an investigator can friend, connect with, or follow the target of an investigation when the investigator does not conceal his true identity or the purpose of his request. The New York City Bar Association, for example, concluded that so long as a real name and real

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36. Witnov, supra note 10, at 75–76.
profile are being used, there are no ethical boundaries being crossed by such a request because the target of the investigation is being provided with only truthful information. On the other hand, the Philadelphia Bar Association concluded that, even if the investigator utilized his real name and real profile, friending, connecting with, or following the target of the investigation would still be unethical because the use of the investigator’s identity would essentially mask the lawyer’s identity and result in the same deception as the lawyer himself using a fake account. Therefore, the Philadelphia Bar Association concluded, it would only be ethical for an investigator to friend, connect with, or follow the target of an investigation on behalf of the lawyer where the investigator provided the target with the name of the lawyer and the purpose of the request (i.e., gathering information for litigation). The San Diego County Bar Association came to a similar conclusion.

Given that most bar associations—including the American Bar Association and the majority of state-level bar associations—have not issued formal opinions addressing this topic, and given that the bar associations which have issued formal opinions have come to different conclusions, lawyers must exercise extreme caution when investigating the social media accounts of represented and non-represented targets of investigations. As one commentator eloquently puts it, “before using social networks to informally collect information, lawyers must weigh the risks, the likelihood of obtaining valuable evidence, and whether alternative ways of obtaining the information exist.” This is simply another way of asking whether the information, and the case it is being sought for, is important enough to run the risk of the lawyer making himself the “test case” delineating the boundaries of the ethical rules in his jurisdiction. While a recent and thorough law review article persuasively argues for a more expansive interpretation of the existing rules, until more definite and consistent ethics opinions are widely adopted many lawyers may be unwilling to risk their professional reputations and licenses to pursue these types of investigations.

39. Id. at 3.
41. Keeling et al., supra note 32, at 156.
42. Witnov, supra note 10, at 76.
43. Keeling et al., supra note 32, at 158–160.
GPS Tracking

Some investigators have sought to leverage the emerging market of consumer-grade GPS tracking technology\(^{44}\) to be better able to locate a plaintiff on the move. This involves placing a small device on the plaintiff’s vehicle and then tracking its location via GPS information sent to a smartphone or tablet. In so doing, the investigator can create a map of the plaintiff’s route as well be alerted to when the plaintiff leaves his home and therefore increase the chance to obtain video of the plaintiff. An investigator recently suggested the use of this technique to a colleague of mine after revealing he was having difficulty locating the plaintiff to conduct video surveillance. The investigator’s suggestion was immediately rejected.

The first consideration with this technique is its potential criminality under federal and state law.\(^{45}\) Moreover, even if it turned out to be legal, there is also both a liability and public relations consideration. Would this be the type of unreasonable act that could generate a bad faith or outrageous conduct claim against an insurance client? Would it be sufficient to generate a tort claim of trespass? Clearly, a lawyer does not want an investigator to take any action that could generate a counterclaim against his client (or himself). In addition, the idea of placing a tracking device on a plaintiff’s vehicle and recording his whereabouts is likely to be perceived as disturbing by the vast majority of people, and it is dubious whether many clients—particularly corporate and insurance clients with substantial marketing concerns—would wish to be associated with such a practice.\(^{46}\)

Then there are still the ethical issues with the technique. While there do not appear to be any ethics opinions addressing this precise issue, Model Rule 8.4 states that it is professional misconduct for a lawyer to engage in conduct involving, \textit{inter alia}, deceit or misrepresentation.\(^{47}\) Arguably, an investigator attaching a hidden GPS device to a plaintiff’s vehicle and then using it to track the plaintiff’s whereabouts—even if

\(^{44}\) There are numerous such devices available for purchase. Amazon.com, for example currently offers some 35 pages of options. http://www.amazon.com/b?ie=UTF8&node=617650011 (last visited Apr. 24, 2015).


\(^{46}\) Indeed, the potential for internet “memes” parodying insurance company slogans (e.g., “like a good neighbor” or “you are in good hands”) superimposed on photographs suggesting stalking behavior is limitless.

only for a limited period of time—may constitute deceitful conduct in that the device is placed surreptitiously and without the consent of the plaintiff.

Similarly, Model Rule 4.4 requires that a lawyer not engage in activities to embarrass, burden, or violate the legal rights of a third person. Clearly, the GPS tracking of a plaintiff could result in the revelation of embarrassing conduct that is not relevant to the case. It could also result in potential civil liability, as discussed above, which may be considered a sufficient violation of the plaintiff’s legal rights.

Given these potential legal, liability, public relations, and ethical issues, one wonders whether the information gleaned from this technique could possibly be worth the risk. In any case, this is likely to be an issue that will become more prevalent in coming years as the technology further proliferates and the temptation to utilize it grows. Lawyers are advised to act with extreme caution in this area.

III. STRATEGIES TO AVOID ETHICAL VIOLATIONS

Even when a lawyer is apprised of the relevant ethical rules and diligently seeks to follow them, there is still a real risk that the private investigator hired by the lawyer is not aware of those rules. It is not inconceivable that the investigator, seeking to do a thorough job, may independently pursue one of the ethically problematic investigative techniques discussed above without seeking the lawyer’s approval. Under Model Rule 5.3, the lawyer remains ethically responsible for the investigator’s conduct, and under the doctrine of respondeat superior, the lawyer and his client may additionally be civilly liable for the investigator’s conduct. Accordingly, lawyers retaining the services of investigators should consider a number of steps to protect themselves and their clients.

Due Diligence

Whether a lawyer is hiring a paralegal, file clerk, or expert witness, it is critical to investigate the candidate’s background to determine who he is and whether he is qualified for the job. The same is true with investigators. Although I receive somewhat frequent solicitations from new investigators looking to earn my business, I do not retain them until I have learned something about their qualifications and background and, ideally, have spoken to a number of their professional references.

49. As Douglas R. Richmond points out, Model Rule 5.3 does not make a lawyer “vicariously liable” for the conduct of his employees and agents. Richmond, supra note 5, at 461–62. While this is literally true, it appears to be a distinction without a practical difference as the employees’ and agents’ ethical violations are often simply imputed to the lawyer’s lack of proper supervision. See id. at 450–61 (citing numerous examples where lawyers were sanctioned for failing to supervise the conduct of employees and agents).
Other commentators have suggested additional due diligence, which I believe is entirely appropriate. This includes a formal interview with the investigator\textsuperscript{50} and checking with the state’s relevant licensing authority to determine whether the investigator is properly licensed.\textsuperscript{51} This also includes determining whether the investigator himself, an employee, or a subcontractor will be doing the actual work, and determining whether the investigator carries liability insurance.\textsuperscript{52} As all lawyers know, this activity should be documented and filed should it be necessary at a future time.

\textit{Rules of Engagement}

It is the lawyer’s responsibility to inform the investigator of what he may or may not do during the course of his investigation.\textsuperscript{53} Therefore, for each assignment the lawyer gives the investigator, the lawyer should provide a letter setting forth the nature of the assignment and any appropriate limitations. While this letter cannot be exhaustive and account for every conceivable circumstance, it can certainly set forth the big picture. For example, it could state that based on the procedural posture of the litigation, there shall be no pretextual contact with the target and no use of social media friending with the target. This gives the investigator clarity on the techniques he may use, limits surprises to the lawyer, and provides the lawyer documentation for his file to show that he is exercising supervision of the investigator. In some jurisdictions this letter may be discoverable, so care must be taken with the extent to which work product or other sensitive details are set forth.

\textit{Actual Supervision}

Model Rule 5.3, as already discussed, requires that a lawyer supervise his nonlawyer employees, and makes the lawyer ethically responsible for the activities of those employees.\textsuperscript{54} A letter setting forth the rules of engagement is a good start, but in the context of a longer-term assignment, a lawyer is well advised to send a periodic email to the investigator seeking a detailed update on the progress of the investigation and the techniques the investigator has utilized. While this hands-on approach could arguably be used to prove an ethical or liability case against the lawyer or his client by showing the level of control he had over the investigator, it is probably a better alternative than a hands-off approach which preserves an argument of plausible deniability.\textsuperscript{55} This is because a hands-off approach is not a shield against either ethical liabil-

\textsuperscript{51} Alexander, \textit{supra} note 14, at 2; Richmond, \textit{supra} note 5, at 487.
\textsuperscript{52} Reibold, \textit{supra} note 50, at 29; Richmond, \textit{supra} note 5, at 487.
\textsuperscript{53} See Alexander, \textit{supra} note 14, at 5.
\textsuperscript{54} \textit{MODEL RULES OF PROF’L CONDUCT} R. 5.3 (2014).
\textsuperscript{55} See Richmond, \textit{supra} note 5, at 488.
ity under Model Rule 5.3 or civil liability under respondeat superior, and therefore it is better to be able to proactively address any problems early on.56 Again, all such communications with the investigator should be preserved for later use if necessary, but care should be taken with the extent of the details set forth in these communications, as they may be discoverable.

Zero Tolerance

Finally, there must be a policy of zero tolerance. Should the investigator take an action which was prohibited by the letter setting forth the rules of engagement, or utilize an investigatory technique past the lawyer’s risk tolerance, the relationship must be immediately terminated. While forgiving mistakes is generally a commendable trait in human beings, the fact of the matter is that a pattern and practice of such mistakes may be all the evidence a future plaintiff needs to support a claim of negligent hiring, negligent training, or negligent supervision. Moreover, such a pattern and practice may be used against the lawyer in a future disciplinary proceeding should the investigator make a major ethical mistake in the future which results in a disciplinary complaint against the lawyer. Any argument that the lawyer did not have reason to believe the investigator would take such an action would be belied by the lawyer’s knowledge of the investigator’s past transgressions.

CONCLUSION

It is not my intent for this article to read like a cautionary tale. In my experience private investigators are typically diligent, hard-working, and honest individuals who provide a valuable service for lawyers and their clients. But by having a firm grasp of some common investigative techniques and the ethical rules that apply to them, lawyers can better ensure that both they and their investigators remain on the right side of the ethical and liability line, while still obtaining potentially valuable information for their clients.

56. Id.