

You are general counsel for an importer of French cuisine. A disgruntled former employee claims to have been fired because he is a whistleblower about unsafe shipping and food handling practices, and has now filed suit. You have received a call from a shipping foreman that believes a temporary hire is actually an undercover investigator for the former employee's attorney, there to gather evidence. *Sacre bleu!* That's unethical. Can a lawyer engage in unethical activity? *Mais non.* Can a lawyer hire someone to engage in undercover activity that, by its nature, fails to disclose the undercover person's identity or purpose? Maybe. *Incroyable!*

The Ethics of Using Undercover Investigators

BY JOHN K. VILLA

Incredible from a literal reading of the ethical rules, but perhaps true. The courts and ethics commissions are wrestling with these issues and their answers lack predictability except in cases at either end of the spectrum, or if you are a government attorney, in which event some courts give you more leeway.

While it may still come as a shock to some, lawyers are ethically bound to be truthful in their dealings with third persons by Model Rule 4.1,¹ and are prohibited by Model Rule 8.4 from engaging in dishonest, fraudulent or deceitful conduct.² In the case of persons represented by counsel, Model Rule 4.2 also restricts lawyers' contact directly with the represented person without consent from that counsel.³ Finally, Model Rule 5.3 provides that whatever a lawyer cannot ethically do directly cannot be done indirectly by a person acting at the direction of the lawyer

and with the lawyer's knowledge or approval.⁴ Thus, where the conduct of the investigator would constitute a violation of ethical norms if engaged in by a lawyer, the rules impose responsibility on the lawyer for the ethical breach.

Despite these ethical proscriptions, government lawyers and, increasingly, private lawyers, engage in deceptive conduct by employing investigators to conduct covert investigations in order to assist in the representation of a client.⁵ And instead of imposing sanctions, some courts and state ethics commissions have found that, in certain circumstances, the use of undercover investigators is ethically permissible under applicable rules. To get a better understanding of this issue, let's take a closer look — first, by addressing the rules governing deceptive conduct, and second, by addressing the rules governing improper contacts.

Misrepresentations and other deceptive conduct

While the Model Rules of Professional Conduct contain express prohibitions on dishonest and deceitful conduct, the commentary provides little insight as to whether the use of undercover investigators would constitute a violation of these rules.

The basic principle is set forth in Model Rule 4.1(a), which provides that, in representing a client, a lawyer shall not "make a false statement of material fact or law to a third person[.]"⁶ According to the commentary, a lawyer who knowingly affirms another person's false statement engages in prohibited conduct under this rule,⁷ but only if the statement is one of material fact.⁸ Would a misrepresentation as to one's identity and purpose, made by an investigator acting under the supervision of a lawyer, constitute a material fact under this rule so as to subject the lawyer to sanctions or disciplinary action under Model Rules 5.3(c)⁹ and 8.4(a)?¹⁰ One could certainly argue that if the undercover investigator revealed his true identity and purpose, it would be "material" to the person whose conduct is being investigated, but courts seem unwilling to credit as legitimate this reading of "materiality."

Similarly, Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."¹¹ Unlike Model Rule 4.1(a), there is no requirement that the misrepresentation be material and there is no commentary specifically addressing this subsection of Model Rule 8.4. Would any misrepresentation fall within this prohibition, or only those that are at least material in nature or involve dishonesty, fraud, deceit, or other conduct



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that adversely reflects on the lawyer's fitness to practice law?¹²

And, of course, for both Rules 4.1 and 8.4, the lawyer may be ethically responsible for the conduct of non-lawyer assistants "that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer."¹³

Unfortunately, the ABA has not issued an opinion directly addressing the ethical propriety of lawyer-supervised undercover investigations under the Model Rules.¹⁴ In the absence of such guidance, there is a discord and a growing divergence between the text of the Rules and permitted conduct. Some commentators,¹⁵ ethics commissions,¹⁶ and courts¹⁷ have opined that the language of the Model Rules is clear and prohibits deception,¹⁸ whether directly by the lawyer or indirectly through a third person, regardless of the nature of the deception or the purpose for its use.¹⁹ Other

authorities, discussed below, have found that the rules do not necessarily preclude deception through the use of undercover investigators.

The reason for this discord can be traced to an unwillingness to deem unethical the historical practice of undercover investigators working at the direction of government lawyers. Indeed, some courts and ethics commissions have explicitly found that prosecutors and government lawyers may ethically direct or supervise undercover investigations, notwithstanding professional conduct rules literally prohibiting conduct involving misrepresentations or deceit.²⁰ Noting that undercover government investigations were an established practice at the time of the adoption of its rule, one state ethics commission has opined that the prohibition against dishonesty, fraud, deceit and misrepresentation was intended to encompass only

such illegal conduct that implicates a lawyer's fitness to practice law.²¹ Accordingly, the commission held "that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation."²² Embracing government investigators is the first step down the "slippery slope" that erodes the rule.

Taking the next logical step down the slope, other courts and ethics commissions have found that, under certain circumstances, private lawyers may also direct or supervise undercover investigations without running afoul of the ethical rules' prohibitions against misrepresentations or deceptive conduct. A good example is *Apple Corps Ltd. v. Int'l Collectors Soc'y*,²³

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an action for breach of a consent order issued in connection with the sale of licensed collectors' stamps, where the defendant moved for sanctions, challenging as unethical the use by the plaintiff's lawyer of undercover investigators who posed as customers seeking to purchase stamps to which they were not entitled, pursuant to the consent order. Rejecting the defendant's contention that Rule 8.4(c) applied to any misrepresentation, regardless of its materiality,²⁴ the court held that the rule was not so expansive and "[did] not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes."²⁵ In reaching its decision, the court relied on criminal cases and civil rights enforcement cases in which the use of undercover investigators to detect wrongdoing had been upheld by the courts,²⁶ together with a dubious application of a de facto rule-of-necessity. Since the plaintiff could not determine whether the defendant was in compliance with the consent order without the use of undercover investigators, the court concluded that their use by plaintiff's attorney did not violate Rule 8.4(c).²⁷ As explained by the court:

Plaintiffs could only determine whether Defendants were complying with the Consent Order by calling ICS directly and attempting to order the Sell-Off Stamps. If Plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of Plaintiffs, such an inquiry would have been useless to determine ICS's day-to-day practices in the ordinary course of business.²⁸

A similar result was reached in *Gidatex v. Campaniello Imports, Ltd.*,²⁹ a trademark infringement action in which the defendant moved to suppress evidence obtained as the result of an undercover investigation.

There, the court similarly found that the plaintiff's lawyer did not engage in unethical conduct by using undercover investigators to pose as customers in the defendant's store to determine whether the defendant was infringing upon the plaintiff's trademark. Applying an analogous provision under New York's then-existing Disciplinary Rules, DR 1-102(A)(4), the court found that the prohibition against misrepresentations was intended to preserve the attorney-client privilege — that is, "to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys."³⁰ By posing as customers, the court continued, the investigators "did not cause the sales clerks to make any statements they otherwise would not have made."³¹ According to the court, the use of investigators posing as customers is an accepted investigative technique, without which it would be nearly impossible to uncover unfair business practices:

These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. 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.³²

More recently, the Professional Ethics Committee of the New York County Lawyers' Association opined that it is not unethical, in limited

circumstances, for a non-government lawyer to use an investigator whom the lawyer knows employs dissemblance in the investigation.³³ As construed by the committee, dissemblance is distinguishable from dishonesty, fraud, misrepresentations and deceit "by [its] degree and purpose," and specifically "refers to misstatements as to identity and purpose made solely for gathering evidence."³⁴ Recognizing that undercover conduct approved of in court decisions, such as *Apple* and *Gidatex*, "[are] most consistent with the overall purposes of the Disciplinary Rules and conform[] to professional norms and societal expectations," the committee found that it is ethically permissible for non-government attorneys to supervise non-lawyer investigators who use dissemblance, but only in the following circumstances:

- (i) the investigation relates to a violation of civil or intellectual property rights and the lawyer has a good faith belief that such a violation is taking place or will take place imminently, or the dissemblance is expressly authorized by law;
- (ii) the evidence is not reasonably available through other lawful means;
- (iii) the conduct of the supervising lawyer and investigator do not otherwise violate the ethical rules or applicable law; and
- (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.³⁵

In addition to court decisions and ethics opinions, the professional conduct rules in a few jurisdictions expressly authorize lawyers to supervise undercover investigators in carefully prescribed circumstances. For example, in Iowa and Oregon the applicable

rule states that it is not professional misconduct for lawyers to supervise lawful covert activity when investigating violations of civil or criminal law, or constitutional rights, "provided the lawyer's conduct is otherwise in compliance with [the applicable rules,]" and "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."³⁶ Florida also makes it ethically permissible for lawyers to supervise undercover investigations — but only in the case of government lawyers.³⁷

Prohibited contacts with third persons

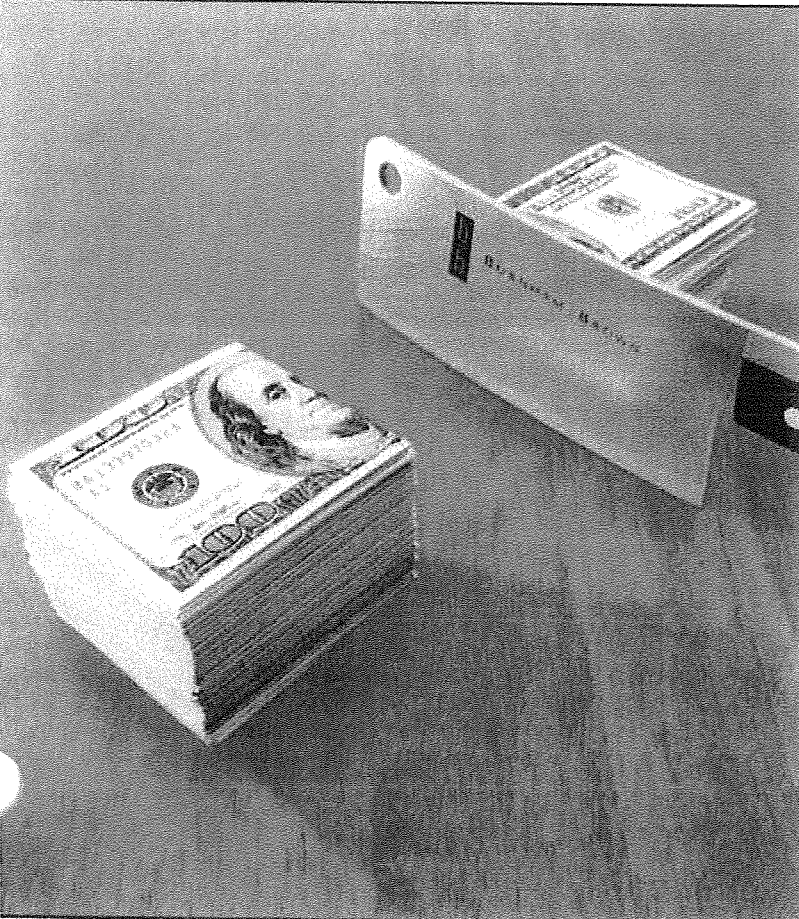
The ethical propriety of undercover investigators use is not only limited to particular types of cases, as discussed above, but may also be subject to the restrictions of other ethical rules — in

particular, Rule 4.2 and Rule 4.3. Once again, the jurisprudence suggests that whether these rules have been violated by private lawyers³⁸ may depend on the court's perception of the purpose of the undercover investigation and the scope of the communications.

Briefly stated, Rule 4.2 prohibits contacts with a represented person, unless that person's lawyer consents, or such contact is authorized by law or by court order.³⁹ In the case of an organization, a represented person includes: 1) any person with managerial responsibility; 2) any person with authority to obligate the organization in the matter in question; or 3) any person whose conduct may be imputed to the organization for purposes of civil or criminal liability.⁴⁰ According to the commentary, the purpose of the rule is threefold: 1) to protect the represented person against possible overreaching by other lawyers connected with the mat-

ter; 2) to protect against any interference with the attorney-client relationship; and 3) to prevent uncounselled disclosures of privileged information.⁴¹

Undercover investigators are often sent to contact the opposing party and almost always without the opposing party's lawyer being present. You, as counsel, would presumably be foreclosed by Rule 4.2 from doing this directly. With respect to the applicability of Rule 4.2 to a lawyer's use of undercover investigators directed at an opposing party, one court has observed that "there is a discernable continuum in the cases from clearly impermissible to clearly permissible conduct."⁴² For example, an undercover investigator's unauthorized contact with the president of a company, or even with a low-level employee, has been held to constitute clearly impermissible conduct, where the purpose of the contact is to elicit admissions to be used in

A black and white photograph showing a stack of US dollar bills on the left and a white envelope with the Burnham Brown logo on the right. The envelope is open, and a stack of dollar bills is visible inside it. The scene is set on a wooden surface.

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pending litigation.⁴⁵ By contrast, contact with lower-level employees by investigators posing as customers engaged in ordinary business transactions has been recognized as ethically permissible, where the purpose of the contact is to ascertain the existence of corporate misconduct.⁴⁴ Because one of the purposes of the no-contact rule is the preservation of the attorney-client privilege, some courts have found no violation of the rule, even though the employees otherwise fell within its coverage, where the investigators' conduct — acting as customers and recording normal business routine — posed no risk that privileged information would be disclosed.⁴⁵

Like Rule 4.2, Rule 4.3 is intended, in part, to protect unrepresented persons from overreaching conduct by lawyers whose clients may have adverse interests.⁴⁶ Thus, where the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in connection with a matter, the rule requires the lawyer to correct the misunderstanding by identifying her client and explaining that their interests might be adverse.⁴⁷

As construed by some authorities, Rule 4.3 applies only to circumstances where the lawyer is acting in a representational capacity on behalf of a client⁴⁸ and “rests upon assumed expectations of persons dealing directly with lawyers.”⁴⁹ Consequently, where lawyers use undercover investigators to engage in routine transactions for the purpose of detecting wrongdoing, one court has held that the rule is inapplicable since neither the lawyer nor the investigators are acting in the capacity of lawyers.⁵⁰ As further explained by one authority, there “should [be] no vicarious applicability to lawyers supervising the activities of [the] undercover investigators and testers, for the latter by definition do not represent themselves as acting on behalf of a lawyer, and so cannot

engender expectations of the sort that Rule 4.3 is intended to protect.”⁵¹

So what is the bottom line?

Step one is to look at the judicial and ethics committee decisions of your state in the hope that clear precedent or guidance is available.

If no clear guidance exists, the most one can say is that the courts and ethical authorities appear to be more accepting of the use of undercover agents where: 1) the investigation relates to violations of court-recognized rights (such as civil or constitutional rights); 2) the purpose of the investigation is to determine whether such rights have been violated; 3) the evidence is not reasonably available through other means; 4) the conduct engaged in by the target of the investigation with the undercover agents would have been engaged in with a member of the public (i.e., the undercover agents are not entrapping the unwitting party into misconduct); and 5) the undercover agents are not seeking to elicit statements about past conduct for use in the litigation. These last two conditions, while not expressly recognized in the case law, would appear to be the essence of the New York County opinion that the undercover agent does not independently violate the rights of the opposing parties.

Well, *mon ami*, you are on your own with this one.

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NOTES

- 1 See ABA Model Rules of Prof'l Responsibility, Rule 4.1.
- 2 See *id.*, Rule 8.4(c).
- 3 See *id.*, Rule 4.2.
- 4 See *id.*, Rule 5.3(c).
- 5 See generally Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based v. Status-Based Ethical Analysis*, 32 Seattle U. L. Rev. 123 (Fall, 2008);

Stanley S. Arkin and Sean R. O'Brien, *Effective Use of Private Investigators by Attorneys*, 12/26/2007 N.Y.L.J. 3 (col. 1); David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 79 8/11/2010 12:14 PM (Summer, 1995).

- 6 ABA Model Rules of Prof'l Responsibility, Rule 4.1(a).
- 7 *Id.*, Rule 4.1, cmt. 1.
- 8 *Id.* at cmt. 2.
- 9 *Id.*, Rule 5.3(c) (imposing responsibility on a lawyer for the conduct of a nonlawyer that would be a violation of the rules if engaged in by the lawyer, if the lawyer either orders or ratifies the conduct; or, having managerial authority in the firm or direct supervisory authority over the nonlawyer, “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”)
- 10 *Id.*, Rule 8.4(a) (providing that “[i]t is professional misconduct for a lawyer ... to 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.”).
- 11 *Id.*, Rule 8.4(c).
- 12 See Isbell and Salvi, *supra*, 8 Geo. J. Legal Ethics at 817-818 (since the rule applies to lawyers acting in a private capacity and in a representational capacity, the authors construe Rule 8.4(c) as applicable only to conduct of a grave nature that reflects adversely on the lawyer's fitness to practice law, and further explain that because Rule 4.1(a) already prohibits material misrepresentations, the prohibition in Rule 8.4(c) cannot apply to lesser misrepresentations, but only to graver ones. This is a conclusion, the authors note, that is also bolstered by the other types of misconduct prescribed in Rule 8.4(c)). Some state ethics commissions have amended their versions of Rule 8.4(c) to add the qualification that the prohibited conduct reflect adversely on the lawyer's fitness to practice law. See, e.g., N.D. Rules of Prof'l Conduct, Rule 8.4 (eff. Aug. 1, 2006); Or. Rules of Prof'l Conduct, Rule 8.4 (adopted Jan.

- 1, 2005); Va. Rules of Prof'l Conduct, Rule 8.4 (added March 25, 2003).
- 13 ABA Model Rules of Prof'l Responsibility, Rule 5.3(c).
- 14 In an opinion addressing the question of whether a lawyer may ethically make electronic recordings without the knowledge of all participants, the ABA left open the issue of whether misrepresentations as to identity and purpose during the course of an investigation are ethically permissible. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 01-422 (June, 2001).
- 15 See, e.g., Michael Bonsignore, "Rules Exist for a Reason: A Commentary on Lawyers Hiring Investigators to Participate in Deceptive Practices," 21 *Geo. J. Legal Ethics* 655, 659-660 (Summer, 2008).
- 16 See, e.g., Phila.Bar.Assn.Prof.Guid. Comm. Eth. Op. 2009-02.
- 17 See, e.g., *In re Paulter*, 47 P.3d 1175, 1180 (Colo. 2002) (en banc); *In re Conduct of Gatti*, 330 Or. 517, 8 P.3d 966, 976 (Ore. 2000) (construing comparable rule under the then applicable Oregon Code of Professional Responsibility).
- 18 See *In re Conduct of Gatti*, supra, 8 P.3d at 976 ("Faithful adherence to the wording of the analogous code rules and this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation or false statements.").
- 19 See *In re Paulter*, supra, 47 P.3d at 1180 ("[E]ven a noble motive does not warrant departure from the Rules of Professional Conduct.").
- 20 See *U.S. v. Parker*, 165 F. Supp. 2d 431, 476-477 (W.D.N.Y. 2001) (rejecting contention that provision of ethical code proscribing deceptive conduct applied to prosecutors who provide supervision and advice to undercover investigators).
- 21 Utah State Bar Ethics Advisory Op. Comm., Op. No. 02-05, at ¶ 9 (March 18, 2002).
- 22 *Id.* at ¶ 10; accord. Va. Legal Ethics Op., No. 1765 (approved by the Virginia Supreme Court on Feb. 6, 2004), (recognizing a law enforcement exception to the prohibition under Rule 8.4(c) that includes investigators supervised by government lawyers charged with investigating housing discrimination; see also Va. Legal Ethics Op., No. 1845 (June 16, 2009), applying Virginia's version of Rule 8.4(c) prohibiting dishonest, fraud, deceit and misrepresentations that reflect adversely on the lawyer's fitness to practice law, and opining that it is not professional misconduct under this rule for staff counsel for the bar's ethics commission to direct covert investigations to uncover unauthorized practice of law violations; cf. District of Columbia Bar Legal Ethics Comm., Op. No. 323 (2004), opining that lawyers employed by government intelligence agencies in non-representational capacities do not violate Rule 8.4(c) if, during the course of their employment, they make misrepresentations that are reasonably intended to further their official duties.)
- 23 *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998).
- 24 *Id.*, 15 F. Supp. 2d at 475-476.
- 25 *Id.* at 475.
- 26 See *id.*
- 27 *Id.* at 476.
- 28 *Id.* at 475.
- 29 *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999).
- 30 *Id.*, 82 F. Supp. 2d at 122.
- 31 *Id.*
- 32 *Id.*; cf. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 699-700 (8th Cir. 2003), (use of undercover investigator to elicit damaging admissions from adversary's employee and president and thereby secure an advantage at trial "fall squarely within Model Rule 8.4(c)'s prohibition of 'conduct involving dishonesty, fraud, deceit or misrepresentation.'").
- 33 NYCLA Comm. on Prof'l Ethics, Formal Op. No. 737 (May 23, 2007).
- 34 *Id.* at 2.
- 35 *Id.* at 5-6.
- 36 Iowa Rules of Prof'l Conduct, Rule 32:8.4, cmt. 6 (effective July 1, 2005), www.iowacourts.gov/professional_regulation; Or. Rules of Prof'l Conduct, Rule 8.4(b) (adopted Jan. 1, 2005), available at www.orbar.org/docs/rulesregs/orpc.pdf. The comment to Iowa's Rule 8.4 also permits lawyers "to participate" in lawful covert activity and "in lawful intelligence-gathering activity."
- 37 See Fla. Rules of Prof'l Responsibility, Rule 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, but providing that "it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule[.]").
- 38 According to the commentary to Model Rule 4.2, contacts by investigators on behalf of government lawyers may fall outside the rule as contacts authorized by law. See ABA Model Rules of Prof'l Responsibility, Rule 4.2, cmt. 5.
- 39 *Id.*, Rule 4.2.
- 40 *Id.*, at cmt. 7.
- 41 *Id.* at cmt. 1.
- 42 *Hill v. Shell Oil Co.*, 209 F.Supp.2d 876, 880 (N.D. Ill. 2002).
- 43 *Midwest Motor Sports*, 347 F.3d at 697-698.
- 44 *Apple Corps Ltd.*, 15 F. Supp. 2d at 473-475.
- 45 *Gidatex*, 82 F. Supp. 2d at 126; see also *Hill*, 209 F. Supp. 2d at 880 (interactions by investigators who act as customers seeking services on the same basis as the general public, or who videotape protected employees engaged in their normal routine are "interactions [that] do not rise to the level of communication protected by Rule 4.2.").
- 46 See *Apple Corps Ltd.*, 15 F. Supp. 2d at 476; see generally, Isbell and Salvi, supra, 8 *Geo. J. Legal Ethics* at 824-825.
- 47 ABA Model Rules of Prof'l Responsibility, Rule 4.3 and cmt. 1.
- 48 *Apple Corps Ltd.*, 15 F. Supp. 2d at 476.
- 49 Isbell and Salvi, supra, 8 *Geo. J. Legal Ethics* at 825.
- 50 *Apple Corps Ltd.*, 15 F. Supp. 2d at 476; cf. *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013 (Del. 1990) (Rule 4.3 violated by lawyer's use of investigators to interview former employees of insurance claimant in connection with underlying litigation, where investigators failed to identify that they were employed by insurance company engaged in litigation with former employer).
- 51 *Id.*