

**CONFLICTS BETWEEN THE
ABA MODEL RULES OF PROFESSIONAL CONDUCT AND
COURT DECISIONS
CONCERNING INVESTIGATIONS**

Sunday, August 6, 2006

ABA Tort Trial & Insurance Practice Section
ABA 2006 Annual Meeting

CHARLES P. BAKER
OF COUNSEL

FITZPATRICK, CELLA, HARPER & SCINTO
30 Rockefeller Plaza
New York, New York 10112-3801
tel/ (212) 218-2270
e-mail/ cbaker@fchs.com
<http://www.fitzpatrickcella.com/>

Copyright 2006 American Bar Association

**CONFLICTS BETWEEN THE
ABA MODEL RULES OF PROFESSIONAL CONDUCT AND
COURT DECISIONS
CONCERNING INVESTIGATIONS**

CHARLES P. BAKER
Fitzpatrick, Cella, Harper & Scinto
New York City
cbaker@fchs.com
<http://www.fitzpatrickcella.com/>

Sunday, August 6, 2006
ABA Tort Trial & Insurance Practice Section
ABA 2006 Annual Meeting

Is it wrong to lie to obtain facts needed for justice? The answer to that question depends on whether one looks to court decisions or to the ABA Model Rules of Professional Conduct. Courts have permitted lying in some circumstances to learn the truth about civil or criminal wrongs, but the Model Rules appear to prohibit any lie whatsoever.

To review the Model Rules first, Rules 4.1(a) and 8.4(c) prohibit lawyers from making any misrepresentation while representing a client, and Rule 8.4(a) makes lawyers vicariously liable for the ethical conduct of non-lawyers, such as investigators. See, e.g., *Midwest Motor Sports v. Arctic Cat Sales*, 347 F.3d 693, 700 (8th Cir. 2003). (The text of the Rules discussed is copied at the end of this paper.) Rule 5.3(c)(1) also seems to prevent lawyers from hiring non-lawyers to do unethical work for them. Id., at 698. The Rule against communications with persons represented by counsel (Rule 4.2) may also be relevant. Id., at 697. If the party contacted is not represented by counsel, Rule 4.3 requires a lawyer, and perhaps those acting on the lawyer's behalf, to explain the lawyer's role in the matter -- the "ethical duty of disclosure." Some courts have said, citing Model Rule 5.3(b), that a lawyers'

employees, even outside investigators, must comply with the lawyers' ethical obligations against deception, and the lawyer has a duty to so advise them. See, e.g., U.S. v. Smallwood, 365 F. Supp.2d 689, 699 (E.D. Va. 2005).

When the Rules are not involved, courts have had no trouble deciding that deception in the search for truth is justified. See, e.g., Sorrells v. United States, 287 U.S. 435, 441 (1932)(“Artifice and stratagem may be employed to catch those engaged in criminal enterprises.”); and Hamilton v. Miller, 477 F.2d 908, 909 n. 1 (10th Cir. 1973)(“While actions intended to found a lawsuit are not favored [that is, false statements by white persons about their interest in an apartment], they at times must be tolerated.”)

When the Model Rules or their State equivalents are brought into the mix, however, the proper and safe course becomes less clear. For example, the Supreme Court of Oregon in In re Gatti, 8 P.3d 966 (2000), construed Oregon State Bar Rules corresponding to Rule 4.1 to prohibit misrepresentations of identity and purpose for the sake of investigating and obtaining facts. In spite of amicus curiae submissions by the U.S. Attorney for the District of Oregon, the Attorney General for the State of Oregon, several consumer groups and others urging that there is an “investigating exception” to these Rules, the Court refused to recognize such an exception and held that the lawyer violated them. (We understand that the Oregon Rules have since been amended.) A number of law review articles also interpret the Model Rules to prohibit any sort of undercover activity or misleading behavior. Douglas R. Richmond, Deceptive Lawyering, 74 U. Cin. L. Rev 577 (2005); Christopher J. Shine, Note, Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception, 64 Notre Dame L. Rev. 722 (1989).

Others argue that this interpretation results from a superficial reading, and that the Rules, despite their apparent breadth, relate only to statements of material fact that lawyers make in their professional capacity representing clients, not to statements made by persons acting in the capacity of an investigator in the course of gathering information, unless the statements are prohibited by other Rules, such as those related to fraud, perjury or misrepresentations that reflect adversely on fitness to practice law. David B. Isbell et al., 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 791 (1995). For another discussion of the "problematic anti-deceit provisions in the Rules," and the "fog" they have created, see "Legal White Lies," Kathryn A. Thompson, ABA Journal, March 2005, pp. 34-35.

Some courts have concluded differently than the Oregon Supreme Court did. In Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999), investigators of the plaintiff posed as customers both before and after a complaint was filed. The investigators asked defendants' sales clerks questions about the quality and workmanship of the products, and secretly tape-recorded their answers. As to the NY State Rule prohibiting attorneys from misrepresentation, corresponding to ABA Rule 4.1, the Court concluded, this is "not a misrepresentation" because "hiring investigators to pose as customers is an accepted investigative technique." See also, Cartier v. Symbolix, 386 F. Supp. 2d 354 (S.D.N.Y. 2005)(both an investigator and an employee of the lawyer's firm posed as customers and spoke with officers of the defendant; cf., Model Rule 4.2).

Because some inquiries by the investigators occurred after the lawsuit began, Gidatex also raised the issue of contacting employees of a party represented by counsel. The

Court concluded that the sales clerks were parties because their statements were being used as admissions, but the Court held that neither a New York Rule that corresponds to Rule 4.2 (communication with a party known to be represented by a lawyer), nor one corresponding to Rule 8.4 (a lawyer circumventing a disciplinary rule through actions of another) were violated. The Court simply reasoned that counsel for plaintiff did not violate the ethical rules because “[t]he use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege,” nor according to the Court, were the sales clerks tricked into making statements they would not have otherwise made. Rather, the investigators merely recorded their conversations as the employee conducted routine business. The Court said in summary, the 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.” (emphasis added.)

In another case explaining the irrelevance to its facts of express statements in the Model Rules against misrepresentations by lawyers or their investigators, Apple Corps Ltd., MPL v. Int’l Collectors Soc., 15 F. Supp. 2d 456 (D.N.J. 1998), plaintiff’s lawyer telephoned defendant using a false name. The Court found that the ethical prohibitions were “intended to prevent situations in which a represented party may be taken advantage of by an adverse counsel.” The Rules therefore did not apply where the “only misrepresentations made were as to the callers’ purpose in calling and their identities. They posed as normal customers.” Further, “The prevailing understanding in the legal profession is that a public or a private lawyer’s use of an undercover investigator to detect ongoing violations of the law is

not ethically proscribed, especially where it would be difficult to discover the violations by other means.”

While the use of investigators and investigative techniques arises in many areas of the law, including unfair housing and other discrimination testing contexts, it arises with some frequency in intellectual property litigation, such as trademark matters. The ABA's IP Law Section, therefore, urged the ABA, even before the revision of the Rules known as “Ethics 2000” began, to clarify limits on the use of investigators along the lines suggested by Isbell. The Section suggested that if the Model Rules were clear and consistent with Court decisions, lawyers would have no hesitation about the proper use of investigators, and lawyers would work closely with them to gather the information the lawyer believes is pertinent. Clients then would be better advised and represented, and investigators would be less likely to exceed ethical limits.

The Section also suggested that the collection of facts in the course of pursuing civil or criminal justice involves a balancing of public policy interests. On one hand, investigators are an indispensable tool for the enforcement of private and public rights. To cite one example from the private area, before commencing a trademark or copyright infringement action, a lawyer often does not know the ultimate source of falsely marked or pirated goods. Distributors of the wrongful goods, however, are unlikely to respond to a truthful inquiry. In fact, if one adheres literally and strictly to the Model Rules, the infringers will disappear into the night. As an example from criminal law, it may be necessary to locate a known witness for a felony trial, but if the accused learns that the government is looking for that witness, his or her life may be endangered.

On the other hand, the Section recognized that extreme methods of collecting information, such as breaking and entering, entrapment, actionable invasions of privacy, and unreasonable searches or seizures, cannot be condoned. The comments of Rule 8.4 refer to “misrepresentations that reflect adversely on fitness to practice law,” which suggests that misrepresentations made in the course of an investigation are not contrary to either Rule 4.1(a) or 8.4(c), unless they are of a character that would carry such an implication. Other interests to be considered in the balance relate to the moral nature of truth, preserving public confidence in the legal system, the trust a lay person may instinctively place in a lawyer, and assuring that parties are put on fair notice of the legal significance of their statements.

While the justification for permitting investigators to be deceptive in some circumstances lies in the higher social good of enforcing private and government rights, an approach based on balancing public policy interests would be difficult to write and difficult to interpret. See Isbell, at 807. Therefore, argues Isbell, it is better, as Rule 4.1 arguably does, to draw a distinction, on one hand, between investigative techniques that break no Model Rule and, on the other, misrepresentations when representing a client as a lawyer.

Such a distinction does not rest on whether the client is a governmental body or a private citizen. While there is some support for this distinction in reported decisions, there seems to be no solid basis for holding one group of lawyers to a lesser standard of ethical conduct based simply on how his or her client is classified. Id. at 805.

In spite of the IP Law Section’s suggestions and the plain problem of the inconsistency between the Rules and the investigating techniques permitted by the Courts, “Ethics 2000” failed to clarify the Rules as requested. The only thing changed in this area was the addition of a comment to Rule 8.4(a) (a lawyer may not induce another to violate a Rule).

The new comment states, "Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take." While this appears to cover advising one's client about misrepresentations of identity or purpose the client can lawfully make to detect unlawful conduct by others, it does not address Rules 4.1(a), 4.2, 4.3, 5.3(c)(1) or 8.4(c). But even if the new comment to Rule 8.4(a) is also deemed to apply to those rules as well, the net effect would be to separate lawyers from the fact gathering process, which may lead to the client's overstepping the bounds of propriety or failing to gather the facts needed, and would certainly make investigations more difficult than they need to be under Court decisions.

More recently, the 2005 University of Cincinnati Law Review article mentioned above on page 2, 74 U. Cin. L. Rev. 577, recommends that all States follow Oregon's example and amend their rules to permit "lawful covert activity" that otherwise complies with rules of professional conduct.

In summary, the present contradiction between the Courts and the Rules makes it hard, at least in some jurisdictions, to know what to do. As a result, some lawyers may use investigators but avoid supervising their activities carefully. In those cases the investigators can create ethical problems for the lawyers who hire them, or the investigators may overlook information they might have obtained if they had been better supervised. Other lawyers may avoid the use of investigators altogether, as the March 2005 ABA Journal article cited above suggests, making it more difficult or impossible to adequately protect the rights of their public or private clients.

ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;

Rule 4.2: Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent to the other lawyer or is authorized to do so by law or a court order.

Rule 4.3: Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

* * *

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

Rule 8.4: Misconduct

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;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Charles P. Baker

Charles P. Baker, of counsel, Fitzpatrick, Cella, Harper & Scinto, New York, New York, a firm of 150 lawyers specializing in all aspects of intellectual property law, has been lead trial counsel or extensively involved in all aspects of patent litigation in fields ranging from computer systems to optical machinery, photocopiers, pharmaceuticals, synthetic textile fibers, military craft (in the U.S. Court of Federal Claims), optical fiber waveguides, and nuclear magnetic resonance spectroscopy. He also has substantial experience advising clients in anticipation of litigation.

Charles Baker has served as Chair of the Intellectual Property Law Section of the ABA, and he is a member of the ABA's Section/Division Committee on Professionalism and Ethics. He also has served as a member of the Boards of Directors of the American Intellectual Property Law Association and the New York Intellectual Property Law Association. He speaks frequently on, and has authored a number of papers on, intellectual property law topics.

He obtained his J.D. from the University of Virginia and a Bachelor of Engineering Physics from Cornell University. He is admitted to the bars of New York State, the District of Columbia, the U.S. Courts of Appeals for the Second Circuit and the Federal Circuit, the U.S. District Courts for the Eastern, Southern and Western Districts of New York, the U.S. Court of Federal Claims, and the U.S. Supreme Court.

June 2006

