

The Ethics of Deception

Pretext Investigations in Trademark Cases

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I. The Problem

- A. Your client or your company has learned of an apparent infringement and wants to stop it via a civil action for an injunction and damages. Or, the infringer who was enjoined a year ago seems to be up to its old tricks again. Or, outside the litigation context, you are clearing a new brand and want to know if the registered mark is still in use, or has been abandoned.
- B. Before filing suit, you have an ethical obligation under Rule 11 to make reasonably sure the facts support your action, so you investigate or ask outside counsel or a private investigator to check out the infringing acts. If the product is mass-produced and sold to consumers, checking availability in retail stores or on the Internet may be an easy and low-risk solution. But if the product or service is not generally sold in such retail channels, and Internet indications are inconclusive, you may need to contact the other party or even visit its place of business.
- C. The investigator says he will proceed, using a suitable ruse to mask his identity and the true purpose of the visit. All this seems reasonable and obvious, since any infringer would immediately clam up before talking to a private investigator or a representative of a potential adversary or its counsel.
- D. However, lawyers have been embarrassed, sanctioned and disciplined, and evidence excluded from court, on ethical grounds. These usually include accusations that a lawyer or his or her agents acted deceptively, or contacted unrepresented parties without making necessary disclosures, or improperly contacted represented parties of adverse interest without their lawyer's permission. So how do you investigate without running afoul of ethical prohibitions? Does it make a difference whether the lawyer does the investigation himself or herself or whether you use a paralegal or private investigator? What are the pitfalls to be avoided and what do's and don't's do you give the investigator?

- E. A thoughtful examination of these questions for bright-line rules and distinctions will probably leave you disappointed, as the answers are heavily fact-dependent and vary with the governing law where your office is located and where the investigation occurs.

II. Applicable Ethical Rules

- A. The ABA Model Rules of Professional Conduct are noted below, as they are the most modern and prevalent set of ethics rules. 42 states have adopted revised rules based on the work of the Ethics 2000 Commission, and 49 states have adopted the Model Rules with some variation (only California has not done so). The Model Rules afford the advantage of extensive accompanying comments that provide more guidance to lawyers than previous statements of ethical rules. However, the Model Rules and comments do not specifically address the subject at hand.

- B. Pretext investigations of trademark infringement usually implicate one or more of three rules of professional responsibility: truthful communications, communications with adverse parties represented by counsel, communications with parties unrepresented by counsel, and the prohibition of deceptive behavior. There is an additional rule on using paralegals or non-lawyer assistants to do the actual investigation which also comes into play on occasion.

C. ABA Model 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; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- D. Communicating with adverse parties represented by counsel.

1. ABA Model 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 of the other lawyer or is authorized to do so by law or a court order.

E. Communicating with parties not represented by counsel.

ABA Model 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. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

F. Deceitful conduct

ABA Model 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;
- (d) engage in conduct that is prejudicial to the administration of justice;

- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Oregon Rule DR 1-102(D)

Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

This rule was revised to reverse the result in *In Re Gatti*, Or. Eth. Op. 2003-173, 2003 WL 22397289, at *2 (Or. St. Bar Ass'n 2003), 8 P.3d 966 (Or. 2000) (Oregon Supreme Court held there was no "investigatory exception" to the State ethics rules; lawyer had used several false identities to investigate alleged insurance scheme). See *Richmond, Deceptive Lawyering*, 74 U. Cincinnati L. Rev. 577, 591 (2005).

G. Using paralegals or other nonlawyer assistants

ABA Model Rule 5.3, dealing with supervising nonlawyer assistants.

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(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; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

III. Court Decisions and Ethics Opinions

A. A seminal case is *Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456, 458 (D.N.J. 1998).

1. Owners of THE BEATLES trademarks, including Yoko Ono Lennon, sued a stamp producer to enjoin unauthorized reproductions of likenesses of the Beatles on stamps. A consent injunction was entered, but the plaintiffs later believed it was being violated.

2. Plaintiffs' counsel engaged investigators to make pretext contacts to see if defendants were violating the consent decree. The investigators asked for and recorded recommendations about which stamps to purchase, and about the acceptance of orders for infringing stamps. No questions were asked about instructions, practices or policies governing the stamps. The investigation revealed violations of the

consent decree, and plaintiffs moved for contempt sanctions. Defendants cross-moved for sanctions on grounds that the investigators violated Rule 4.2, prohibited contact with persons known to be represented by counsel.

3. The court found no ethical violation. New Jersey law extended the protection of Rule 4.2 only to the company's litigation control group. The sales clerks did not fall within that group, so the ex parte communication was allowable.
4. With respect to the anti-deception provisions of Rule 8.4, the court gave no weight to the misrepresentations that were limited to the investigators' identity and their purpose in contacting defendant:

"RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as member[s] of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule." 15 F. Supp. 2d at 474-75.

- B. The New Jersey Apple Corps decision was followed the next year in New York in *Gidatex v. Campaniello Imports, Ltd*, 82 F. Supp. 2d 119, 119-20 (S.D.N.Y. 1999).

1. Plaintiff terminated defendant's license to sell Saporiti Italia brand furniture. Defendant continued to sell off its stock and to display the Saporiti Italia trademark, while selling customers other brands after they entered the store. Plaintiff's counsel hired private investigators to pose as interior designers and tape record incriminating conversations with defendant's sales staff.
2. Defendant filed a motion in limine to exclude the evidence on grounds that it was obtained unethically and illegally. The court denied the motion on three grounds:
 - a) the ethical prohibition of contacting adverse parties who are represented by counsel was inapplicable;

- b) plaintiff's attorneys had not violated the ethics rules even if they did apply; and
 - c) exclusion of evidence was not the proper remedy in any event.
3. The court reasoned that the purpose of the anti-contact rule was to prevent circumvention of the attorney-client relationship. However, the investigators acted like members of the public and did nothing more (other than taping the conversations) than an ordinary consumer would have done in asking the sales staff questions about their products. The sales clerks, low-level employees, would not have disclosed, or even have known, any information protected by the attorney client privilege.
 4. The court noted the salutary purposes of pretext investigations in trademark infringement cases:

"These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover [investigator] posing as a member of the general public engaging in ordinary business transactions with the target." 82 F. Supp. at 122.

C. The New York court followed this approach in *A.V. By Versace, Inc. v. Gianni Versace, S.p.A.*, 2002 U.S. Dist. LEXIS 16323 (S.D.N.Y. Sept. 3, 2002)

1. "The Court rejects Alfredo Versace's complaint that the use of a private investigator has caused an unfair invasion of his privacy. . . . Gianni Versace's investigator used a false name and approached L'Abbigliamento posing as a buyer in the fashion industry. . . . The investigator's actions conformed with those of a business person in the fashion industry, and Alfredo Versace makes no allegation that the private investigator gained access to any non-public part of L'Abbigliamento. . . . Further, courts in the Southern District of New York have frequently admitted evidence, including secretly recorded conversations, gathered by investigators posing as consumers in trademark disputes. See, e.g., *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 123-24 (S.D.N.Y. 1999)(permitting introduction of secretly recorded conversations between private investigators

and sales people for the defendant in a trademark infringement trial); *Nikon, Inc. v. Ikon Corp.*, 803 F. Supp. 910, 921-22 (S.D.N.Y. 1992), *aff'd*, 987 F.2d 91, 95-96 (2d Cir. 1993))(allowing introduction of investigators' interviews with non-party sales clerks to demonstrate 'passing off' and actual confusion among consumers between Ikon and Nikon cameras); see also *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 597 F. Supp. 1186, 1188 (E.D.N.Y. 1984), *aff'd*, 765 F.2d 966 (2d Cir. 1985)(affirming permanent injunction issued after considering secretly recorded videotape of defendants' principals meeting with undercover investigator hired by plaintiff to discuss counterfeiting scheme)."

D. *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876 (N.D. Ill. 2002).

1. This was a civil rights case, not a trademark case, and the court endeavored to reconcile *Gidatex*, *Apple Corps* and the district court opinion in *Midwest Motor Sports* (see discussion below) in the context of racial discrimination allegations. Plaintiffs conducted undercover investigations of gas station attendants to prove discriminatory practices. Defendants moved for a protective order under Rules 4.2 and 4.3.
2. The court found the employees to be represented by counsel, making Rule 4.2 applicable but Rule 4.3 inapplicable. Attempting to find the right balance in applying the rules, the court stated:

"Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course." 209 F. Supp. at 880.
3. The court thus found that videotape recordings of the employees' ordinary course of conduct in reacting to customers was proper under Rule 4.2. The court reserved for trial, however, the admissibility of the substantive conversations, held outside the normal business transaction, between the investigators and the employees.

E. However, *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003), came out the other way.

1. The case arose from the discontinuance of the sale of a certain snowmobile line at the plaintiff's store. The investigator testified that defendant's lawyers hired him to visit plaintiff's showroom, talk to a salesman about products, to find out which snowmobiles were being recommended, and to look at the equipment. He recorded his conversation to see if the salesman would say anything about the lawsuit. He also said he was supposed to get into "financing, promotions, and close-out pricing" with the sales people. He admitted in his deposition that his purpose was to elicit evidence rather than to reveal evidence of how typical consumers would be treated.
2. The court analyzed the anti-contact rule, Rule 4.2, by saying its purposes were to prevent getting adverse party statements by circumventing opposing counsel, to protect the attorney-client relationship, to prevent the inadvertent disclosure of privileged information, and to facilitate settlement by channeling disputes through the attorneys.
3. The court rejected the contention that all corporate employees were within the anti-contact rule, recognized instead a spectrum of categories of employees for purposes of Rule 4.2. Since the salesman's statements would be imputed to the corporate plaintiff, the court found that salesman to be within the protection of Rule 4.2, distinguishing *Apple Corps.* and similar cases which restricted protection to the control group.
4. The court found that defendant's counsel, via their investigators, had violated the anti-contact rule of Rule 4.2, would have violated Rule 4.3 even if the salesman had been held to be unrepresented by counsel, and sanctioned counsel for deceptive conduct and interviews under false pretenses.

F. *Design Tex Group, Inc. v. U.S. Vinyl Mfg. Corp.*, 2005 U.S. Dist. LEXIS 2143 (S.D.N.Y. Feb. 14, 2005)

1. Court followed *Gidatex* and denied a motion to exclude evidence on the ground that it was obtained in violation of ethical rules.

2. ". . . [I]n response to what purported to be an ordinary purchasing inquiry made by an investigator working for plaintiffs, a U.S. Vinyl employee sent a sample book that included the allegedly [copyright] infringing pattern to a New York City address."
3. "Defendants argue that this action should not be attributed to the company because it was carried out by a low-level employee who had not received an instruction not to mail out the sample book in question. In the absence of any evidence that the employee was actually disobeying a company directive, there is no case law supporting this proposition."
4. "Also rejected is defendants' argument that this evidence should be excluded because plaintiffs' actions violated ethical rules. It is not 'an end-run around the attorney/client privilege' if investigators merely 'recorded the normal business routine' rather than interviewing employees or tricking them 'into making statements they otherwise would not have made.'"

G. Chloe v. Designersimports.com USA, Inc. 2009 US Dist Lexis 42351 (SDNY April 29, 2009)

1. This case involved the sale of counterfeit CHLOE handbags by defendant. Plaintiff's private investigator called defendant to order a bag, and sent a check in under a pseudonym. She also made a couple follow up calls to defendant's sales clerks under her pseudonym to find out when the bag would be delivered. Defendant complained about the fraud and duplicity involved in the pretext.
2. The court rejected the duplicity challenge, stating that courts in the Southern District of New York have frequently admitted evidence gathered by investigators posing as consumers in trademark disputes, citing Versace and Gidatex.
3. The court cited and revalidated the broad statement from Apple Corps.:

"The prevailing understanding in the legal profession is that a public or 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. [Apple Corps.], 15 F. Supp. 2d 456, 475 (D.N.J. 1998). Indeed it is difficult to imagine that any trademark investigator would announce her true identity and purpose when dealing with a suspected seller of counterfeit goods."

H. NYCLA Committee On Professional Ethics Formal Opinion No. 737 (May 23, 2007) is one of the small number of ethics opinions specifically directed to the issue.

1. Entitled "Non-government lawyer use of investigator who employs dissemblance". Interestingly, the opinion does not address whether the lawyer himself or herself is ever permitted to make "dissembling statements" directly !
2. "Dissemblance" is not unauthorized if narrow conditions are satisfied:
 - a) Either
 - (1) The investigation concerns either a civil rights or intellectual property violation which the lawyer in good faith believes is taking place or will take place, or
 - (2) The dissemblance is expressly authorized by law; and
 - b) The evidence sought is not reasonably and readily available through other lawful means; and
 - c) The lawyer's and investigator's conduct do not otherwise violate The New York Lawyer's Code of Professional Responsibility or other applicable law; and
 - d) The dissemblance does not unlawfully or unethically violate the rights of third parties.

I. Alabama Ethics Opinion No. RO-2007-05

1. "During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same

basis or in the same manner as a member of the general public.”

J. Office of Lawyer Regulation v. Stephen P. Hurley, No. 2007AP478-D (Wis. Sup. Ct. 2009)

1. Attorney Hurley was defending a client, Sussman, being prosecuted for child pornography. Hurley's defense theory was that the minor, S.B., who was allegedly exposed to the pornography by Sussman was independently viewing and collecting the same pornography on his own.
2. Hurley wanted to get S.B.'s computer to see if it contained the pornography. He hired a private investigator who obtained S.B.'s computer through deceit, saying he was conducting a survey concerning computer usage and would provide a free new computer in return for turnover of S.B.'s existing computer.
3. Hurley instructed the investigator not to contact S.B. unless his mother was present, and to give S.B. an opportunity to remove anything he wanted to from the computer. The computers were swapped, and a forensic computer specialist found pornography on S.B.'s computer.
4. The District Attorney filed a disciplinary complaint against Hurley, alleging misconduct involving making a false statement to a third party, and engaging in conduct involving fraud, dishonesty, deceit or misrepresentation.
5. In the hearing, testimony indicated a widespread belief among the Wisconsin bar that Hurley's conduct was permissible, and common practice among prosecutors. The Supreme Court upheld the dismissal of the complaint against Hurley, stating that no Wisconsin statute or rule drew the distinction between prosecutors and private practitioners urged by the District Attorney. The Court also noted Hurley's ethical obligation to zealously defend his client's liberty and essentially gave him the benefit of the doubt.

K. ABA Formal Opinion 95-396 (1995).

1. Rule 4.2 attaches when you know the other party is represented by counsel in the matter, whether as a potential

adversary, witness, or as an interested party.

2. Representation of a company does not necessarily bar communications with all employees of that organization, but does extend to employees whose actions and statements can be imputed to the company.

IV. Some Suggested Guidelines

- A. This is a thorny area of ethical practice, where the authorities and decisions are in tension if not outright conflict. It is all the more difficult because investigation of facts is necessary and commonplace in trademark clearance and litigation practice. At a minimum, issue-awareness and due diligence are essential steps toward staying out of harm's way and complying with legal and ethical obligations.
- B. Check local ethics rules, disciplinary rulings and opinions and case law before embarking on a pretext investigation, in the states where you are admitted to practice, where the case is pending, and where the investigation will take place. The courts in highly commercial jurisdictions, like New York or New Jersey, that handle a greater volume of trademark infringement, counterfeiting and deceptive trade practices cases seem to be more tolerant of pretext investigations than courts that see fewer such cases. Compare *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 227 U.S.P.Q. 377 (2d Cir. 1985) (use of private investigators allowed in counterfeit handbags case) and *Nikon Inc. v. Ikon Corp.*, 803 F. Supp. 910 (S.D.N.Y. 1992), *aff'd*, 987 F.2d 91, 25 U.S.P.Q.2d (2d Cir. 1993) (investigators allowed to provide evidence of passing off), with *Midwest Motor Sports*, *supra*.
- C. The lawyer should not do the pretext investigation himself or herself. It does not necessarily legitimize the investigation to do it through a paralegal or private investigator, but doing the "dissembling" directly seems unnecessarily risky. Even the New York ethics opinion that approves dissembling under certain conditions is expressly qualified not to apply to actions by the lawyer personally.
- D. Distinguish between non-litigation or pre-litigation settings, and pending litigation. During pending litigation, you are closer to the dangerous end of the spectrum, with the courts likely to

- apply more stringently the rules against communicating with persons represented by counsel and/or unrepresented persons. Checking to see if current use of a trademark can be found, as a due diligence aspect of routine trademark clearance, is near the safer and more acceptable end of the spectrum as it is within the realm of inquiries that would be made members of the consuming public who might be looking for the product to purchase.
- E. Checking and documenting business practices and transactions in the ordinary course of business with members of the general public is on the more innocuous and defensible end of the spectrum. It is hard to see how this subverts the attorney-client relationship intended to be protected by the no-contact rules, and characterizations of this type of interchange pervade the decisions holding no violation took place. If the basic interview passes ethical muster, secret audiotaping or videotaping is probably acceptable as well, provided it is lawful under applicable laws on "wiretapping" or taping without permission.
 - F. Trying to elicit admissions as to details, decisions, motivations and effects is on the more dangerous and unacceptable end of the spectrum. Baiting employees to make damaging admissions and reveal damaging details beyond the scope of typical exchanges with members of the general public.
 - G. Consider exactly who is being interviewed. Talking to sale clerks or other "public-facing" employees is on the safer end of the spectrum, as opposed to officers or managers who are more responsible in the corporate hierarchy, who are more likely to interact with counsel and/or bind the company with their statements and actions. However, remember that Midwest Motor Sports held that sales clerks' statements would be imputed to the company.
 - H. If you use a private investigator, it is probably a good idea to give detailed written instructions including goals and do's and don't's. Even with a highly capable investigator who knows the boundaries of legal ethics, it is to your advantage to have a written record of the investigation's scope and limitations, just in case you have to defend it, yourself and your investigator. If you have used a particular investigator in the past and are confident of his or her standard operating procedures, there is probably less need for detailed instructions on new assignments.

- I. Whatever you do, be extra careful if your investigation takes place, or if your case is or would be located in the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota), the venue of the harsh ruling in the Midwest Motor Sports case discussed above.

V. Acknowledgments and Bibliography

I acknowledge with gratitude the invaluable input of numerous friends and colleagues: Bill Freivogel, an ethics expert with a great blog on conflicts of interest at <http://www.freivogelonconflicts.com/>; Professor David Hricik of Mercer University School of Law; Arthur Garwin, of the ABA Center for Professional Responsibility; Douglas Richmond, Senior Vice President, Aon Global Professions Practice Group; and my partner Phil Barendolts. Mistakes, of course, are my own.

I also note that I presented an earlier version of this outline at an INTA Trademark Administrator's Forum in Chicago several years ago.

A lot has been written on this subject, and the issues are not limited to the trademark law context focused on above. The following does not purport to be a comprehensive bibliography, but cites numerous in-depth articles and other sources for further reference.

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- D. Hricik, David, Increasing Liability for Flawed Pre-Suit Investigations, (as yet unpublished; extensive discussion of patent litigation issues; I believe he is presenting it at the ABA Section of Intellectual Property Law Spring CLE Conference in April, 2010).

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