THE PELLICAN'S MESS – ETHICAL CONSIDERATIONS FOR ATTORNEYS WHO HIRE PRIVATE INVESTIGATORS IN THE WAKE OF PELLICANO©

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INTRODUCTION

It is often said that a good attorney never asks a question to which he or she does not already know the answer. For many attorneys the information on which they rely for knowing those answers is based on the work of private investigators. Indeed, while in most litigation settings, the majority of factual information comes from the client and eventually from the other party, private investigators can be useful, if not essential tools for finding and providing attorneys with independent information and objective evidence. Investigators are regularly engaged by attorneys in various assignments, including conducting surveillance, locating and interviewing potential witnesses, service of process, and locating assets. However, the recent indictment of Anthony Pellicano ("Mr. Pellicano"), the former "P.I. to the stars," and the subsequent indictment of Terry Christensen ("Mr. Christensen"), (the managing partner in the prominent Century City based law firm Christensen, Glaser, Fink, Jacobs, Weil & Shapiro),[1] demonstrates that attorneys who engage private investigators should proceed with caution.

The Recent Pellicano Matter.

In early 2006, Mr. Pellicano, who is known for handling sensitive investigation work for everyone from Michael Jackson to Tom Cruise, was indicted on 112 charges of wiretapping and of paying policemen to illegally access law-enforcement databases.[2] The scandal has been dubbed "Hollywood's Watergate,"[3] due to its potentially far reaching effects, given Mr. Pellicano's numerous connections and prior work for many of Tinseltown's elite, including some of its most prominent attorneys, as well as his apparent penchant for secretly recording conversations, including many of those with his own clients.

At the time of Mr. Pellicano's indictment he was already serving time for various weapons charges, but was scheduled to be released from prison in February 2006.[4] Approximately one week after Mr. Pellicano's indictment, a grand jury indicted Mr. Christensen for allegedly hiring Mr. Pellicano to wiretap Lisa Bonder Kerkorian, the ex-wife of billionaire and former MGM owner, Kirk Kerkorian.[5] The two count indictment alleged that Mr. Christensen, in 2002, paid Mr. Pellicano at least $100,000 to record and report on Kerkorian's ex-wife's phone conversations, including those with her attorney, a

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1 See, Jesse Hiestand, *Lawyer Indicted in Pellicano Case*, http://www.hollywoodreporter.com, (Feb. 16, 2006); Kellie Schmitt, *Attorney Terry Christensen Indicted in Case Involving Hollywood PI Pellicano*, The Recorder, http://www.law.com, (Feb. 16, 2006); Andrew Blankstein and Greg Krikorian, *Lawyer Indicted in PI Inquiry*, http://www.latimes.com, (Feb. 16, 2006), and John Roemer, *A Dirty Job that Smudges Legal Ethics, Cases Shine Light On Dark Side of Work Private Eyes Do for Lawyers*, Daily Journal Newswire Article, (March 30, 2006)

2 See, Brian Burrough & John Connolly, *Talk of the Town: Pellicano*, Vanity Fair (June 2006), at 88; and Adam Christian, *Catching Up With the Pellicano Trial, It all Began with Steven Seagal*, http://www.slate.com, (April 3, 2006).

3 See, Benjamin Svetkey, *Who's Next?*, Entertainment Weekly, (April 21, 2006), at 13-14.

4 See, Burrough & Connolly, *supra*, at 93.

5 See, Hiestand, *supra*.

court mediator and others, to gain a tactical advantage in a legal dispute relating to child support payments.[6]

Although Mr. Christensen is the first attorney with links to Mr. Pellicano to be indicted, he is not expected to be the last. There are at least a half dozen other well known and well respected Southern California attorneys who used Mr. Pellicano's services, and have cases known to be under federal scrutiny.[7] Daniel A. Saunders, the United States attorney who has been overseeing the case indicated that "[a]ny further indictments are almost certain to take aim at the lawyers."[8] Indeed, Bertram Fields ("Mr. Fields") of the Century City law firm now known as Greenberg Glusker,[9] has long acknowledged that federal authorities notified him he is a subject of their investigation.[10] However, recent reports have stated that federal prosecutors have decided, for now, not to seek an indictment against Greenberg Glusker.[11] Despite that fact, Mr. Fields, along with Paramount head Brad Grey, were recently added as defendants in a wiretapping, unauthorized disclosure of confidential information and invasion of privacy civil lawsuit,[12] relating to a prior case in which Mr. Pellicano is alleged to have engaged in illegal wiretapping,[13] and it has been reported that Greenberg Glusker "still face[s] civil lawsuits filed by those named as 'victims' in the [Pellicano] indictment who now allege that the firm was responsible for Pellicano and his associates allegedly violating their civil rights through wiretaps and illegal background checks."[14] There are also apparently pending legal actions, which will attempt to reopen cases and reverse judgments that may have been entered due to the alleged misconduct committed by Mr. Pellicano and the hiring attorneys.[15]

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[6] See, Schmitt, *supra*.

[7] See, Burrough & Connolly, *supra*, at 93.

[8] See, David M. Halbfinger and Allison Hope Weiner, *Pellicano Case Casts Harsh Light on Hollywood Entertainment Lawyers*, www.nytimes.com, (May 23, 2006).

[9] Greenberg Glusker was up until recently known as Greenberg, Glusker, Fields, Claman, Machtinger & Kinsella.

[10] See, Hanusz, *supra*; and Roemer, *supra*.

[11] See, Greg Krikorian, Henry Weinstein and Jean Guccione, *Law Firm That Often Used Pellicano Won't Be Charged for Now, Federal Prosecutors Say*, www.latimes.com, (April 13, 2006). It should be noted that "it's been nearly four years since an FBI raid of Pellicano's office found evidence of illegal wiretaps, and almost three since Fields admitted he was a target of the investigation," and despite his well publicized relationship with Mr. Pellicano, and months of ongoing reports of impending federal indictments, Mr. Fields has not been indicted, and it appears "the investigation of Pellicano's computers has not yielded the type of evidence against Fields that it apparently did against Christensen, making the Christensen recordings look increasingly like a windfall." See, Justin Scheck, *Hollywood Litigator Fields Ducks Pellicano Net*, www.law.com, (May 10, 2006).

[12] The civil lawsuit, which recently added Mr. Fields and Mr. Grey as defendants, was initiated by screenwriter Vincent "Bo" Zenga and alleges among other things, that Mr. Zenga lost a prior lawsuit against Mr. Grey and his production company, solely because of Mr. Pellicano's illegal wiretapping and unlawfully accessing confidential information. See, John Hanusz, *Lawyers Invoke Pellicano to Reopen Cases*, Los Angeles Daily Journal, (May 2006), at 1

[13] See, Hanusz, *supra*; and Roemer, *supra*.

[14] See, Krikorian, *supra*.

[15] See, Hanusz, *supra*, at 1 & 10.

While Mr. Christensen's indictment has no doubt sent shivers through many of the attorneys who previously retained the once popular investigator, his case should also serve as a wake up call to all attorneys who have, or may in the future retain the services of any private investigators. This is not to say that attorneys should refrain from using private investigators or that most investigators engage in the type of illegal activities with which Mr. Pellicano is charged. In truth the majority of investigators, like the majority of attorneys, no doubt operate with integrity and conduct themselves both ethically and legally, and should not be condemned as a whole based on what may be a fairly extreme incident. However, the indictment of Mr. Christensen and the civil suit involving Mr. Fields demonstrate that attorneys (and their clients) who engage the services of private investigators may be held liable (both criminally and civilly) for the actions and tactics used by their investigators. Additionally, to the extent an investigator's misconduct involves fraud, dishonesty, or criminal acts, attorneys facing civil claims based on such investigator misconduct may encounter difficulties in convincing their insurance companies to provide coverage for the defense of such claims.[16]

The lessons to be learned, as discussed below, are that attorneys who hire private investigators need to perform their due diligence in the selection process, and properly advise their investigators on the nature, scope and boundaries of their assignments. More importantly, attorneys have a duty to supervise and monitor the work their investigators perform on an ongoing basis to ensure that the investigators they hire comply with ethical and professional rules, and do not engage in illegal activities, in performing their services. The purpose of an attorney's duty to supervise their investigators (and other outside agents) is to protect both themselves and their clients from potential liability.

PROFESSIONAL RULES, RISKS AND POTENTIAL LIABILITIES

Attorney's Affirmative Duty to Supervise Agents.

In California, an attorney's duty to supervise the work performed by private investigators hired by the attorney (as well as any other non-attorney employees or agents) is set forth in Rules of Professional Conduct, Rule 3-110(A), which provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."[17] The "Discussion" section of Rule 3-110 further provides that "[t]he duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents."[18] While the courts have recognized that "[a]ttorneys cannot be held responsible for every detail of office operations,"[19]

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16 See, Krikorian, *supra* ["If convicted of an intentional criminal act, the firm's insurers are no longer responsible to help defray litigation costs…Insurance typically covers only negligent acts. Without insurance coverage, lawyers could be held personally liable for verdicts against the firm."]

17 See, Rules of Professional Conduct, Rule 3-110(A).

18 See, "Discussion" section of Rules of Professional Conduct, Rule 3-110.

19 See, *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.

attorneys have long been required to exercise reasonable supervision of their employees and agents.[20]

As a general rule, if an attorney is required to do or prohibited from doing something by the Rules of Professional Conduct, so are any agents hired by the attorney, including private investigators.[21] Some examples of professional rules, with which attorneys should be certain any private investigators they hire are informed, and comply, include the prohibitions against communicating with a represented party,[22] revealing confidential client information,[23] making extrajudicial statements by means of public communication that may prejudice an adjudicative proceeding,[24] suppression of evidence,[25] advising a witness to secrete him or herself, and/or pay, or offering to pay compensation to a witness contingent on the content of the witness's testimony.[26] Also, attorneys retaining investigators must be sure to not compensate an investigator by "directly or indirectly" sharing legal fees from the attorney's client.[27] Moreover, if an attorney does enter into an improper fee-splitting agreement with an investigator, in violation of Rule 1-320, the attorney may be barred from raising the defense of illegality of contract in the case of a fee dispute based on such improper agreement.[28]

Concerns Re Fair Credit Reporting Act.

Furthermore, attorneys retaining private investigators on behalf of employers wanting to investigate their employees or perform background checks on potential employees, or simply to prepare an investigative report that may contain a third party's credit profile, should be sure that they and their investigator are aware of any duties that may be triggered under the Fair Credit Reporting Act ("FCRA"), as a result of any such reports or investigations. The FCRA, which was enacted in 1996, and made effective in 1997, created new duties for users of consumer reports and for furnishers of information

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20 See, *Zamora v. Clayborn Contracting Group, Inc*., (2002) 28 Cal.4th 249, 259 [legal assistant's typo in settlement agreement is attributable to counsel]; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 259-60; *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273, 276 [secretary's inadvertent disposal of filing is attributable to counsel].

21 Note, this general rule is set forth more specifically in the context of prohibiting an attorney from communicating with a represented party, in Rules of Professional Conduct, Rule 2-100 ["a member shall not communicate directly *or indirectly* …with a party the member knows to be represented by another lawyer."] Further, this general rule has been codified in the Model Rules, Rule 8.4(a), and DR 1—102(A)(2), which clearly state that attorneys may not avoid their professional responsibilities by instructing non-attorney agents to do for them that which they cannot do themselves. While the conduct of California attorneys is governed by the Rules of Professional Conduct and not the Model Rules, the Model Rules may be looked to for guidance, especially in areas where California courts have not spoken. See, *People v. Ballard* (1980) 104 Cal.App.3d 757, 761; and *Altschul v. Sayble* (1978) 83 Cal.App.3d 153.

22 See, Rules of Professional Conduct, Rule 2-100.

23 See, Rules of Professional Conduct, Rule 3-100, and Bus. & Prof. Code § 6068(e); see *In re Complex Asbestos Litigation* (1991) 232 Cal.App. 3d 572, 588 ["The obligation to maintain the client's confidences traditionally and properly has been placed on the attorney representing the client."].

24 See, Rules of Professional Conduct, Rule 5-120.

25 See, Rules of Professional Conduct, Rule 5-220.

26 See, Rules of Professional Conduct, Rule 5-310.

27 See, Rules of Professional Conduct, Rule 1-320.

28 See, *Cain v. Burns* (1955) 131 Cal.App.2d 439.

to consumer reporting agencies.[29] The FCRA prohibits "consumer reporting agencies," which the definition of, in some circumstances, may include private investigators and law firms, from furnishing "consumer reports" for "employment purposes" unless the "consumer" is notified of and consents to disclosure of the report, and is furnished with a copy of the report if it results in an "adverse" personnel action (e.g., discipline, demotion, termination, etc.).[30] At least for a time, under the FCRA, background and misconduct investigation reports that included personal information related to a person's credit worthiness were considered "consumer report[s]," and subject to strict notice and disclosure requirements set forth in the FCRA. However, the Fair and Accurate Credit Transactions Act of 2003 ("FACT"), which amended the FCRA, apparently nullified and created some exclusions from the FCRA's more onerous provisions and disclosure requirements.[31] However, any employers, attorneys, or investigators planning to initiate any such investigations or background checks are recommended to first consult an experienced employment law attorney for clarification and understanding of any and all FCRA and/or FACT requirements and duties which may still be applicable to such investigations.

Potential Liability for an Investigator's Intentional Torts.

In the civil liability context in California, it has generally been held that the rule that a master or principal can be civilly liable for the torts of a servant or agent, committed within the scope of employment, also applies to the relationship existing between a hirer and private investigator.[32] In *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, the court held that attorneys retaining an investigator may be liable for the intentional torts of employees of the private investigator, committed in the course of employment.[33] In the *Noble* case, a private investigator was retained by Sears' attorneys to help in the defense of a personal injury lawsuit.[34] In an effort to secure the address of a witness, an employee of the investigator allegedly "gained admittance to a hospital room where plaintiff was confined and, by deception, secured the address."[35] The plaintiff sued Sears, its attorneys, and the investigator, but the trial court sustained a demurrer to the complaint.[36] However, the Court of Appeals reversed the trial court's decision as to plaintiff's causes of action for invasion of privacy and negligent entrustment of agents.[37]

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[29] See, Anne P. Fortney, *Fair Credit Reporting Act Potential Liability of Furnishers and Users of Consumer Reports*, Practicing Law Institute Corporate Law and Practice Course Handbook Series, (April-May 1999); and 15 U.S.C. § 1681, et seq.

[30] See, Rod M. Fliegel and Ronald D. Arena, *The FACT and How It Affects FCRA and Employment Investigations (the Vail Letter)*, http://www.littler.com, (January 2004).

[31] See, Fliegel, *supra*.

[32] See, 73 A.L.R. 3d 1175, (1976), at Sec. II, § 3[a].

[33] See, *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654

[34] *Id,* at 663.

[35] *Id*, at 656.

[36] See, John S. Caragozian, *Private Eyes*, Los Angeles Lawyer, (Dec. 2004), Vol. 27, No. 9, at 2.

[37] See, *Noble, supra*, at 664.

The *Noble* court held that "an unreasonably intrusive investigation may violate a plaintiff's right to privacy."[38] The *Noble* court also held that Sears and its attorneys, as "principals" may have vicarious liability.[39] The court explained that "it appears that in California the hirer of a detective agency for either a single investigation or for the protection of property, may be liable for the intentional torts[40] of employees of the private detective agency committed in the course of employment."[41] The *Noble* court also held that Sears and its attorneys may be liable for negligence in their choosing of the detective agency.[42] The court noted that "the fact that [the investigator] was a licensed detective agency is one fact to be considered in determining whether the lawyers and Sears were negligent in their choice," but the court stated that it could not say "as a matter of law, this was sufficient to show that Sears and its attorneys exercised reasonable care in their choice."[43]

In explaining its holdings, the *Noble* court stated, "[a]lthough a principal may be liable for the torts of an agent committed in the scope of authority [citation omitted], that theory of vicarious liability is not based on the fact that the principal is negligent if he fails to supervise the agent. The principal is held liable as a matter of public policy, in order to promote safety for third persons. The theory of liability is that the principal is holding out the agent as competent and fit to be trusted, and thereby, in effect, warranting good conduct and fidelity of the agent."[44]

The *Noble* case also dealt with the issue of an investigator, hired by an attorney, communicating with a represented party, in violation of Rule 2-100, which provides that a California attorney "shall not communicate directly or *indirectly* about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."[45] In *Noble,* an employee of the investigator hired by the attorneys defending Sears, communicated with plaintiff regarding the location of a witness.[46] While the *Noble* court upheld the trial court's ruling on defendants' demurrer as to plaintiff's cause of action for invasion of attorney-client relationship, and held that a violation of Rule 2-100 does not give rise to a civil-action for damages, the court noted that such a violation "subjects an attorney to disciplinary proceedings."[47] Further, other courts have held that attorneys who violate Rule 2-100 (or the Model Rules version thereof, Rule 4.2) may face sanctions by the

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[38] See, *Id*, at 660.

[39] See, *Id*, at 662-663.

[40] Note, the *Noble* court did not consider or address the liability or non-liability of the hirer for negligent torts of the employees of a detective agency. However, there is no reason to believe that there may be any less liability for negligent conduct then there is for intentional conduct. See*, Id*, at 663, fn. 8.

[41] See, *Id*, at 663; citing *Draper v. Hellman Com. T. & S. Bank* (1928) 203 Cal. 26.

[42] See, *Id*, at 664.

[43] See, *Id*.

[44] See, *Id*, at 663; citing *Turner v. N.B.&M.R.R. Co.* (1868) 34 Cal. 594, 599; and *Bk.Of Cal. V. W.U. Tel Co*. (1877) 52 Cal. 280, 288.

[45] See, Rules of Professional Conduct, Rule 2-100(A).

[46] See, *Noble, supra*, 657.

[47] See, *Noble, supra*, at 658; citing *Abeles v. State Bar* (1973) 9 Cal.3d 603; and *Mitton v. State Bar* (1969) 71 Cal2d 525, 534.

trial court, including evidentiary sanctions[48] and disqualification from any role in the lawsuit at issue.[49] In addition to any sanctions imposed by the trial court, as pointed out by the court in *Noble*, an attorney may face disciplinary actions from the State Bar of California for any violations of Rule 2-100.[50]

No Exception from Civil Liability for Unknown or Unauthorized Tortious Conduct of Investigators.

A common defense asserted by principals when faced with claims that an agent or employee engaged in tortious or improper activity in performance of services on behalf of their principal, is that the principal did not authorize or was unaware of such conduct. In fact, in the case of Mr. Pellicano, Mr. Fields and his law firm, Greenberg Glusker, have "denied knowledge of any illegal activity," and asserted that "if Mr. Pellicano engaged in any illegal activity, he did so without their or the firm's knowledge or authorization."[51] While it is unclear whether pleading ignorance may offer protection from criminal liability to principals for unauthorized actions taken by their agent/investigators,[52] it appears that as far as a principal's potential civil liability for an agent/investigator's tortious conduct goes, ignorance is not bliss.

In *Draper v. Hellman Commercial Trust & Savings Bank* (1928) 203 Cal. 26, the Supreme Court held that "[t]he principal is liable for the agent's torts committed in the scope of his employment and in performing service on behalf of the principal, even though in the commission of the unlawful act the agent violated the principal's express instructions or exceeded his authority."[53] The *Draper* case dealt with an action for damages for libel brought against Hellman Commercial Trust & Savings Bank ("Hellman Bank"), which had hired a detective agency to locate a former employee suspected of stealing money from the bank.[54] The libel action was brought after the detective agency sent and presented a copy of a telegram that clearly set forth that plaintiff was suspected of appropriating bank funds, to British American Bank, which the detective agency believed knew plaintiff's location. British American Bank in turn proceeded to

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[48] See, *Midwest Motor Sports v. Arctic Cat Sales, Inc*. (8th Cir. 2003) 347 F.3d 693, 697-700 [Appellate court affirmed evidentiary sanctions where investigator hired by attorney communicated with and secretly recorded conversations with a represented party in violation of Model Rules of Prof'l Conduct, Rule 4.2].

[49] See, Caragozian, *supra*, at 5; citing *Lewis v. Telephone Employees Credit Union* (9th Cir. 1996) 87 F3d 1537, 1558; and *Mills Land & Water Co. v. Golden West Ref. Co*. (1986) 186 Cal.App.3d 116, 133 (superseded by rule, as to different point of law, as stated in *La Jolla Cove Motel v. Superior Court* (2004) 121 Cal.App. 4th 773).

[50] See, Bus. & Prof. Code § 6077.

[51] See, Robert W. Welkos, *Lawyer to Celebrities Is Subject of Inquiry*, http//www.latimes.com, (Feb. 7, 2006).

[52] See, Halbfinger and Weiner, *supra*, ["A lawyer might get away with 'He didn't tell me what he was doing, I never condoned or authorized this, all I ever learned from him was that our adversary had the following embarrassing facts that could be uncovered,' …but those lawyers who came to rely on Mr. Pellicano as an all-but-indispensable weapon could have trouble passing the buck. 'If the lawyer has himself hired Pellicano repeatedly, and if Pellicano, essentially, usually engages in wiretapping, I think the government is going to be able to prove something.'"]

[53] See, *Draper, supra*, 203 Cal. at 38-39.

[54] See, *Id*, at 33-34.

forward a copy of the same telegram, provided by the detective agency, to the Bank of Montreal, where plaintiff was employed at the time, after which his employment was immediately suspended.[55] Hellman Bank unsuccessfully argued that it could not be held liable for the actions taken by the detective agency because "it did not authorize said detective agency to send such a telegram."[56] Although the *Draper* case did not involve the hiring of an investigator by an attorney or law firm, there is no reason to believe a principal/attorney would be held any less liable than Hellman Bank was, for any unauthorized and/or unknown tortious conduct of an agent/investigator.

Concerns Re Professional Liability Insurance Coverage.

An additional concern for attorneys facing civil claims as a result of an investigator's alleged misconduct, particularly to the extent such alleged misconduct may involve fraud, dishonesty, or criminal acts, is that such attorneys may encounter difficulties in getting their professional liability carriers to pay damages or claim expenses in connection with such claims.

Insurance Code § 533, which is deemed to be part of every insurance policy,[57] provides that "an insurer is not liable for a loss caused by the willful conduct of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."[58] For purposes of Insurance Code § 533, a "willful act" is "an act deliberately done for the express purpose of causing damage or intentionally performed with knowledge that damage is highly probable or substantially certain to result."[59]

Furthermore, the majority of professional liability policies include broad coverage exclusions stating that there is no coverage for claims "[m]ade against an Insured arising, in whole or in part, out of any actual dishonest, fraudulent, criminal or malicious act or omission, committed by, at the direction of, or with the knowledge or such insured."[60] Such policy exclusion would apply to many types of commonly alleged investigator misconduct, including making fraudulent misrepresentations, as well as illegal methods of investigation such as wiretapping, bugging, and/or trespassing. Fortunately, such exclusions usually include "innocent insured" exceptions requiring attorney foreknowledge for the exclusion to apply, stating "[t]his exclusion does not apply … to an insured who, in fact, did not personally commit, direct, participate in committing or have knowledge of such wrongful acts when they occurred and this

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55 *Id*.

56 *Id*.

57 See, *Evans v. Pacific Indem. Co*. (1975) 49 Cal.App.3d 537, 540 [Section 533 is "a contract and is equivalent to an exclusionary clause in the contract itself."]

58 See, *Insurance Code* § 533; and *Gray v. Zurich Ins. Co*. (1966) 65 Cal. 2d 263, 277; *Tomerlin v. Canadian Indemnity Co*. (1964) 61 Cal. 2d 638, 648 [The statutes "establish a public policy to prevent insurance coverage from encouragement of willful tort.']

59 See, *Mez Indus. v. Pacific Nat'l Ins. Co*. (1999) 76 Cal.App. 4th 856, 875.

60 See, Diane L. Karpman and William T. Baker, *Another Program Ripped From The Headlines - Ethics Issues Inspired By The Pellicano Investigation*, APRL Annual Meeting, (July 31, 2006).

exclusion shall not apply with respect to any damages or claim expenses for personal injury."[61]

Ethical & Professional Rules Governing Private Investigators.

Beyond the ethical and professional rules applicable to attorneys that could potentially be violated by a hired private investigator, California attorneys should also be familiar with, and mindful of the ethical and professional rules governing California private investigators. While attorneys in California are governed by the Rules of Professional Conduct and Business and Professions Code, private investigators must comply with California's Private Investigator Act ("PIA").[62] The Bureau of Security and Investigative Services ("BSIS") division of the California Bureau of Consumer Affairs is the regulatory and licensing authority for private investigators in California.[63]

The PIA provides a definition of what constitutes a "private investigator,"[64] and prohibits unlicensed persons from acting as private investigators.[65] The BSIS provides the requirements for licensure as a private investigator in California, which includes being 18 years of age or older, undergoing a criminal history background check through the California Department of Justice and Federal Bureau of Investigation, meeting a minimum years of compensated experience in investigative work (number of years varies from 2-3 years depending on applicant's prior work experience and level of education), passing a state administered written exam covering laws and regulations, and paying a license fee, and once the license is granted, it must be renewed periodically.[66]

The PIA sets forth that "[a]ny person who violates any provision of this chapter or who conspires with another person to violate any provision of this chapter, relating to private investigator licensure, or who knowingly engages a nonexempt unlicensed person is guilty of a misdemeanor punishable by a fine of five thousand dollars ($5,000) or by imprisonment in the county jail not to exceed one year, or by both that fine and imprisonment."[67] Thus, anyone--including attorneys-- who knowingly hire an unlicensed person acting as an investigator could face criminal penalties, including a hefty fine and/or imprisonment. Public prosecutors may also seek civil remedies against an unlicensed person acting as investigators, their coconspirators, and anyone who knowingly engages such persons to act as investigators, including an injunction (for which prosecutors need not "show lack of adequate remedy at law or irreparable

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61 *Id*.

62 Bus. & Prof. Code §§ 7512-73.

63 See, Frank E. Melton, and Nancy Swaim, *Sherlock and Me: A Labor Lawyers Tale*, BHBA Barristers Workshops, (June 7, 2006), at 4.

64 Bus. & Prof. Code § 7521.

65 Bus. & Prof. Code §§ 7520 & 7523.

66 See, Melton, *supra*, at 4; also see, Caragozian, *supra*, at 6, citing Bus. & Prof. Code §§ 7525, 7525.1, 7526, 7527, 7541, 7541.1; and http://www.dca.ca.gov/bsis/bsispi.htm

67 See, Bus. & Prof. Code § 7523(b).

injury"), a civil fine up to $10,000, and reimbursement of BSIS investigation expenses.[68] Further, an aggrieved litigant may move to exclude evidence gathered by an unlicensed person acting as an investigator.[69]

The PIA also provides for denial, suspension, and revocation of a private investigator's license for specific types of misconduct, which includes, but is not limited to impersonating a law enforcement officer,[70] committing assault, battery, kidnapping, or using force or violence on any person, without proper justification,[71] knowingly violating, or advising, encouraging, or assisting the violation of any court order or injunction,[72] acting as a runner or capper for any attorney,[73] committing any violation of the California Privacy Act,[74] which, in relevant terms to the claims against Mr. Pellicano, outlaws secret wiretapping, eavesdropping and recording.[75]

Furthermore, the PIA prohibits private investigators from committing "any act in the course of the licensee's business constituting dishonesty or fraud."[76] "Dishonesty or fraud" includes "(a) Knowingly making a false statement relating to evidence or information obtained in the course of employment, or knowingly publishing a slander or a libel in the course of business; (b) Using illegal means in the collection or attempted collection of a debt or obligation; (c) Manufacture of evidence; (d) Acceptance of employment adverse to a client or former client relating to a matter with respect to which the licensee has obtained confidential information by reason of or in the course of his or her employment by the client or former client."[77]

Moreover, any evidence gathered by an investigator via the use of "dishonesty or fraud" may be excluded by the court. In *Redner v. Workmen's Compensation Appeals Board* (1971) 5 Cal.3d 83, a workmen's compensation case, an insurance carrier hired an investigator, who then hired someone to befriend the allegedly injured worker. The hired "friend" proceeded to invite the injured worker to a party at a ranch, where after getting the worker inebriated he induced the worker to go horseback riding, which the investigator caught on film.[78] While the insurance carrier did not attempt to introduce the film to the referee of the case, after the referee refused to admit medical reports, which recounted and relied upon the content of the film, and found that the applicant had suffered a 57 percent disability, the insurance carrier appealed.[79] The insurance carrier did subsequently produce the film for the first time at the appellate proceedings, and in reliance on the film and the previously excluded medical reports, the Workmen's

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68 See, Caragozian, *supra*, at 6, citing Bus. & Prof. Code § 7523.5(a), (c).

69 See, Caragozian, *supra*, at 6, citing *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App. 3d 272, 287.

70 See, Bus. & Prof. Code § 7561.1(e), & Bus. & Prof. Code § 7561.3.

71 See, Bus. & Prof. Code § 7561.1(h).

72 See, Bus. & Prof. Code § 7561.1(i).

73 See, Bus. & Prof. Code § 7561.1(j).

74 See, Penal Code §§ 630-637.9.

75 See, Bus. & Prof. Code § 7561.1(m).

76 See, Bus. & Prof. Code § 7561.4, and § 7538(b).

77 See, Bus. & Prof. Code §7561.4(a)-(d).

78 See, *Redner, supra*, 5 Cal.3d at 87.

79 *Id*.

Compensation Appeals Board found that the applicant had suffered no permanent disability.[80]

However, the Supreme Court reversed the Appeal Board's decision, and ruled that "the carrier should not profit from its own deceitful conduct. The investigators feigned friendship and concealed their employer's identity in bringing about applicant's inebriation and effectuating his horseback ride. …[T]he referee found that the carrier fraudulently obtained the film by means of a violation of [the] applicant's rights …therefore …the board may not rely upon evidence obtained, as in the present case, by deceitful inducement of an applicant to engage in activities which he would not otherwise have undertaken."[81]

In making its decision the *Redner* court noted that "the private investigator may well make an intrusion into the individual's right of privacy which would be objectionable or offensive to the reasonable man. …[and in such cases] Courts have permitted such an individual to maintain an action for damages against the intruders."[82] Although the plaintiff in *Redner* was not seeking civil damages for the investigator's improper conduct, this passage no doubt served as a precursor to the *Noble* case (in particular the invasion of privacy cause of action asserted therein), which was decided approximately 2 years later.

Thus, attorneys who hire private investigators to perform any type of undercover investigations need to be extra cautious and proactive in supervising the investigator's activities and tactics to try to protect against conduct that may be construed as an "objectionable or offensive" invasion of privacy, which could result in a civil damages claim (against the investigator, attorney and client) or evidence being excluded (or possibly criminal charges). While there is no bright-line rule as to what conduct is sufficiently "offensive" to elevate it to the level of an improper "invasion of privacy," the case law seems to show that the conduct must be particularly deceitful and egregious (i.e. feigning friendship and inducing intoxication as in *Redner*, or invading the hospital room, through means of deception, and communicating with a represented opposing party, as in *Noble*). If proven to be true, the current allegations in the civil suit against Mr. Pellicano and Mr. Fields (i.e., using illegal wiretapping to listen to attorney-client communications, in order to gain a tactical advantage in litigation), also appear to be of the type that would qualify as an "objectionable or offensive" invasion of privacy.

The PIA also provides a qualified duty of confidentiality for investigators, stating that except for "any information he or she may acquire as to any criminal offense [which may permissibly be divulged to a law enforcement officer or district attorney at any time], …he or she shall not divulge to any other person, except as he or she may be required by law so to do, any information acquired by him or her except at the direction of the employer or client for whom the information was obtained."[83] While this duty of

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80 *Id*, at 90.
81 *Id*, at 94-95.
82 *Id*, at 94.
83 See, Bus. & Prof. Code § 7539(a).

confidentiality does not necessarily create any corresponding privilege or protection from discovery, private investigators retained directly by attorneys may avail themselves of, and assert the attorney work product doctrine to prevent disclosure of the attorney's or the investigator's "impressions, conclusions, opinions, or …theories."[84] Further, an investigator acting as an attorney's agent may assert the attorney-client privilege to protect communications between an attorney's client and the investigator.[85]

RECOMMENDATIONS

Prior to retaining a private investigator, attorneys should review their professional liability policies to ensure that they are familiar with the various provisions and exclusions that may come into play in the event of any claims being brought against the attorney for alleged misconduct by the investigator.

Selection Process.

Due to the potential liabilities and risks involved in hiring a private investigator (for both the attorney and client), an attorney seeking to do so should first get written approval from the client, and completely document the selection process to protect against any later *Noble* type claims of alleged negligence in choosing the investigator. Attorneys should then look to trusted colleagues for referrals who have actual working experience with the investigator. Besides referrals from colleagues, another source for potential investigators is the California Association of Licensed Investigators ("CALI").[86]

Once an attorney has gathered the names of a few potential investigators, a critical first step in the selection process should be to inquire about, and check on the investigator's current license status, and whether any disciplinary actions have been taken against the investigator. This information can be found at the websites for both the BSIS,[87] and CALI.[88] While the court in *Noble* stated that it could not say "as a matter of law, [the fact that the investigator was licensed] was sufficient to show that...[the] attorneys exercised reasonable care in their choice," it did note that "the fact that [the investigator] was a licensed detective agency is one fact to be considered in determining whether the lawyers…were negligent in their choice."[89] Obviously a valid

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[84] See, Caragozian, *supra*, at 5; citing, Code of Civ. Proc. § 2018(c); *Rodriguez v. McDonnell Douglas Corp*. (1978) 87 Cal.App.3d 626, 647-48 [An investigator retained by a defendant's attorney took notes regarding what a witness stated. The notes would have been discoverable under California law, because they were "nonderivative or noninterpretive." However, the investigators own "comments about [the witness's] statement" are "protected absolutely from disclosure," and the comments were "so intertwined" with the notes that "all portions…should be held protected…"]; and *O'Connor v. Boeing N. Am., Inc.* (C.D. Cal. 2003) 216 F.R.D. 640, 652-53 [A private investigator who interviewed witnesses "on plaintiff's counsel's behalf" was protected by the federal attorney work product doctrine from having to disclose what the witnesses said.]

[85] See, Caragozian, *supra*, at 5; also see, *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 236.

[86] See, www.cali-pi.org

[87] See, www.dca.ca.gov/bsis/lookup.htm

[88] See, www.cali-pi.org

[89] See, *Noble, supra*, at 664.

P.I. license is not the only gauge an attorney should use when choosing an investigator. In the case of Mr. Pellicano, he was a licensed private investigator throughout the time he has been alleged of wrongdoing, up until he was convicted in 2002 on weapons charges, as the BSIS apparently cancels licenses when holders are found guilty of crimes related to their work.[90] However, in light of the fact that an investigator having a valid license may help reduce an attorney's (and perhaps the client's) potential liability in a claim for negligent choosing of the investigator, as well as the potential criminal penalties for anyone who "knowingly" hires an unlicensed investigator, confirming the current validity of an investigator's license, prior to retaining him or her, is not only prudent, but essential.

The attorney should also request and check on references provided by the investigator, as well as inquire whether the investigators have current insurance (liability and E&O).

The hiring attorney should perform a conflicts check of the potential investigators, and conversely have the potential investigators perform a conflicts check of all the parties and counsel involved.

The next step an attorney should take in selecting a private investigator should be to determine whether the investigator has adequate experience and is skilled in the type of matter and services that he or she will be required to perform. For instance an investigator experienced in computer forensics and data recovery may not be the best candidate for an undercover or surveillance type of investigation, and vice versa. Most importantly, the attorney should then make certain that the investigator has an adequate understanding of the law, as well as the ethical and professional rules (applicable to both attorneys and investigators) in general, and as they specifically relate to the type of services the investigator may be performing, and that he or she agree to comply by all such laws and professional and ethical rules. The attorney should also set forth the scope, overall objective and parameters of the assignment, and inquire and learn the steps by which, if hired, the investigator would perform his or her services, including learning the identity, experience and knowledge of any other personnel (besides the primary investigator) to be selected and utilized by the investigator in performing his or her services. Once compensation and hourly fees of the investigator have been discussed, the investigator should be requested to provide an estimated budget for his or her services.

Also, if an attorney or law firm which frequently hires and utilizes private investigators (or other outside agents) has not already done so, it should prepare and adopt general policies regarding the handling of client matters, which the hiring attorney can then provide a written copy of to the investigator at the inception of their employment.[91] The hiring attorney should require the investigator to sign and return

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[90] See, Roemer, *supra*, at 2.

[91] A good example of such a document, setting forth a firm's general polices and practices relating to client matters can be found in a recent County Bar Update article. See, Evan A. Jenness, *Supervising Outside Agents in a Blame-the-Lawyers World*, County Bar Update, (Aug. 2006), vol. 26, no. 7, p. 3 & 8.

such document, which will not only help ensure that any investigators hired by the attorney and/or firm will know generally what is expected of them, but it may also provide the attorney and/or firm, and the client, with an added layer of protection should subsequently any misconduct by the investigator be discovered.[92] Such written policies should include polices mandating that investigators (and all outside agents) run conflict checks and advise immediately of any conflicts or potential conflicts, as well as confirmation that the investigator will employ only lawful means, and means that are consistent with the standards of professional conduct applicable to attorneys and private investigators, in the performance of their services, including but not limited to protecting client confidences[93] and not contacting any represented parties.[94]

Ongoing Supervision of Retained Investigator.

After choosing an investigator, the hiring attorney should reconfirm in writing and detail the scope, objective, and parameters of the assignment, and the means by which the investigator will carry out the assignment (this confirmation can be included by the investigator as part of his or her retainer agreement). A copy of this written confirmation/retainer agreement, along with an estimated budget from the investigator, should be provided to the attorney's client for review and approval.

Once the investigator has begun his or her assignment, the attorney should request, and the investigator should provide, regular communications and updates (oral and/or written) as to what steps the investigator has taken, what results, if any, have been achieved, whether it appears additional tasks and/or costs will be necessary to complete the assignment, and if the investigator will be able to stay on budget and meet all deadlines, if any, relating to the assignment. Depending upon the nature of the investigator's assignment, the hiring attorney may want to have a regular update schedule set forth in the retainer agreement, with the caveat that the investigator will immediately apprise the attorney of any significant developments that may occur, including , variations from the budget or schedule, or significant potential problems or issues.

In the Event of Impropriety.

In the event the hiring attorney should learn that the private investigator has engaged in any type of improper conduct in the performance of their services, despite all of the attorney's precautions and guidance, the attorney should inform the client, and determine whether immediate termination of the investigator's services is necessary and/or appropriate. The attorney should also consider what, if any, steps may be taken to rectify the investigator's misconduct, and depending on the nature of the misconduct, whether the attorney is required to bring such misconduct to the attention of the court or

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92 See, Jenness, *supra*, p. 3 & 8.

93 The written policies and/or retainer agreement should impose some type of ongoing confidentiality requirement on the investigator that would protect the client's confidential information even after the investigator has completed his services.

94 See, Jenness, *supra*, p. 3 & 8.

other appropriate authority. Once again, the attorney should fully document any discoveries of impropriety on the part of the investigator, as well as any and all actions taken by the attorney to remediate the misconduct. Such documentation may serve to protect the attorney and the client from potential liability that may arise as a result of the investigator's misconduct. The attorney should also consider whether the circumstances warrant reporting of a potential claim to the attorney's insurance carrier, particularly if the situation takes place shortly before the attorney's policy is due to expire, as the potential claim would otherwise have to be disclosed in the renewal application.

CONCLUSION

The ramifications of the current Pellicano matter will no doubt be seen and felt for months and possibly years to come. The charges against Mr. Pellicano have not only brought about criminal indictments, and the filing of new civil lawsuits, but there are also apparently legal actions in the works, which will attempt to reopen cases and literally undo judgments that may have been entered due to the alleged misconduct committed by Mr. Pellicano and the hiring attorneys.[95] Indeed, the Pellicano matter has put the spotlight on, and made the conduct of private investigators, and the potential liability of those who hire them—particularly attorneys--a hot topic.[96] However, in this era of increased attorney accountability and liability for the actions and conduct of their agents, it is perhaps a good reminder to all attorneys to perform their due diligence in selecting and exercising their duty of supervision over investigators (as well as all non-attorney agents and employees) to protect both themselves and their clients, and more importantly, to think twice when contemplating the proper and ethical use of an investigator. While some attorneys and investigators may like to chalk up what they consider minor ethical indiscretions to "zealous representation" of their clients, the Pellicano matter should make it clear that any conduct that would require an attorney, or agent thereof, to violate a Rule of Professional Conduct, or the law, is unjustifiable.

[95] See, Hanusz, *supra*, at 1 & 10.

[96] See, Halbfinger and Weiner, *supra*, ["It is only now becoming clear that powerful businesspeople and stars are just collateral damage in a hunt for the real target: what governmental lawyers see as corruption in a legal system that is suddenly being policed after decades of neglect."]

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A founding partner of **Parker Mills & Patel LLP**, Mr. Parker has been identified as among the leading California experts on legal malpractice in "Who You Gonna Call" in the *California Lawyer*, p. 25 (February 2002), and in the "Lawyers' Lawyers" issue of the Daily Journal's *California Law Business* (November 30, 1998) in the article entitled "The Malpractice Practice."

Mr. Parker was a founding member of, and senior partner at, Lewis, D'Amato, Brisbois & Bisgaard. Mr. Parker graduated Summa Cum Laude and Phi Beta Kappa from the University of California at Los Angeles in 1972, where he also obtained his law degree in 1976, graduating Order of the Coif. In his third year of law school, Mr. Parker served as the Associate Editor of the UCLA Law Review. Mr. Parker is a member of the State Bar of California and is admitted to practice before all of the state courts in California, the States District Courts in California and Hawaii, and the Ninth Circuit Court of Appeals. He has tried dozens of jury and non-jury trials and arbitrations. He has acted as the principal attorney in numerous reported decisions of the California Supreme Court and Courts of Appeal, and has served numerous times as an expert witness and as a consultant in his areas of expertise.

Mr. Parker has authored numerous law review articles and monographs, and has frequently lectured in his areas of expertise, as well as other subjects, for public and private seminars, for law firms, for legal departments, for bar associations, and for other professional and business groups. Mr. Parker is a past member of the Board of Governors of the Association of Business Trial Lawyers, and is a past Chair of the Errors & Omissions Prevention Committee and a former member of the Professional Liability Insurance Committee of the Los Angeles County Bar Association. Currently, Mr. Parker serves as Vice Chair of the LACBA Ethics and Professional Responsibility Committee.

PIERRE B. PINE

A senior associate at **Parker Mills & Patel LLP**, Mr. Pine joined the firm in February 2001. Mr. Pine received his undergraduate degree from Loyola Marymount University in 1995. During his attendance at Loyola, Mr. Pine was academically selected to attend a study-abroad program at Queen's College, Oxford, England.

Mr. Pine graduated in the top of his class from the University of San Diego School of Law in 2000, where he was a merit scholarship recipient for all three years, and received honors for highest class grades in California Civil Procedure and Lawyering Skills (legal research & writing), including Best Brief Award During his attendance at USD, Mr. Pine also studied International Comparative Constitutional Law at Trinity College, in Dublin, Ireland, under Supreme Court Justice Antonin Scalia.

Mr. Pine is a member of the State Bar of California and is admitted to practice before all of the state courts and States District courts in California. He is also a member of the American Business Trial Lawyer's Association and the Beverly Hills Bar Association (Business, Intellectual Property, and Entertainment Law sections).

Rules of Professional Conduct

Rule 3-110. Failing to Act Competently.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal 3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P 2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily

Rules of Professional Conduct

Rule 1-320. Financial Arrangements With Non-Lawyers

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except that:

(1) An agreement between a member and a law firm, partner, or associate may provide for the payment of money after the member's death to the member's estate or to one or more specified persons over a reasonable period of time; or

(2) A member or law firm undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member; or

(3) A member or law firm may include non-member employees in a compensation, profit-sharing, or retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement, if such plan does not circumvent these rules or Business and professions Code section 6000 et seq ; or

(4) A member may pay a prescribed registration, referral, or participation fee to a lawyer referral service established, sponsored, and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California.

(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule.

Discussion:

Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment.

Rules of Professional Conduct

Rule 2-100. Communication With a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

Rules of Professional Conduct

Rule 3-100. Confidential Information of a Client

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or

other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1) Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

1. the amount of time that the member has to make a decision about disclosure;
2. whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
3. whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
4. the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
5. the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
6. the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact

with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

1. whether the client is an experienced user of legal services;
2. the frequency of the member's contact with the client;
3. the nature and length of the professional relationship with the client;
4. whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;
5. the likelihood that the client's matter will involve information within paragraph (B);
6. the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
7. the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law. (Added by order of the Supreme Court, operative July 1, 2004.)

Rules of Professional Conduct

Rule 5-120. Trial Publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal proceedings); and (4) the timing of the statement.

Paragraph (A) is intended to apply to statements made by or on behalf of the member.

Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the member's duty to maintain client confidence and secrets.

(Effective October 1, 1995)

Rules of Professional Conduct

Rule 5-220. Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Rules of Professional Conduct

Rule 5-310. Prohibited Contact With Witnesses

A member shall not:

(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.