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PRETEXTING

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CA Rule 5.3(c)

With respect to a nonlawyer employed or retained by or associated with a lawyer:
a lawyer shall be responsible for conduct of such a person* that would be a violation
of these rules or the State Bar Act if engaged in by a lawyer if:

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

CA Rule 8.4(a)

It is professional misconduct for a lawyer to:
violate these rules or the State Bar Act, knowingly¹ assist, solicit, or induce another
to do so, or do so through the acts of another

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CA / ABA Rule 4.1

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;*

CA Rule 8.4(c)

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

CA Rule 8.4(c), cmt 5

Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, 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 rules and the State Bar Act.

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ABA Rule 4.2

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.

Cmt 7

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent.

CA Rule 4.2

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.

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CA Rule 4.2

(b) In the case of a represented *corporation*, partnership, association, or other private or governmental organization, this rule prohibits communications with: (1) A *current officer, director, partner, *or managing agent* of the organization; or (2) A *current employee*, member, agent, or other constituent of the organization, *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. . . .

(d) For purposes of this rule: (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

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“Although Rules 4.1(a) and 8.4(c) on their face impose sweeping prohibitions, in fact they have been interpreted to contain narrowly defined exceptions that permit the gathering of evidence under certain circumstances. . . .

The second exception permits civil attorneys to use investigators in certain circumstances to obtain information that would normally be available to any member of the public (such as a prospective renter or a consumer making a similar inquiry). . . . in the context of trademark disputes, attorneys may retain undercover investigators to pose as ordinary customers in order to gather evidence of suspected infringement.”

Leysock v. Forest Lab’ys, Inc., 2017 WL 1591833, at *6 (D. Mass. Apr. 28, 2017)(dismissing complaint as sanction for counsel’s use of pretextual survey of physicians to document off-label prescriptions).

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Site 2020 Inc. v. Superior Traffic Servs., LLC, No. CV 21-63-M-DLC, 2023 WL 4248715, at *2 (D. Mont. June 29, 2023)(imposing sanctions based on pretextual business meeting at which client affiliates interrogated patent infringement defendant regarding information relevant to patent claims)(counsel not involved)

Impossible Foods Inc. v. Motif Foodworks, Inc., No. CV 22-311-WCB, 2023 WL 3790729, at *1 (D. Del. May 31, 2023)(“The weight of authority indicates that misrepresentations made solely as to identity or purpose do not rise to a violation of Rule 4.1 when the investigator is posing as a customer in the ordinary course of business.”)

Midwest Motor Sports v. Arctic Sales, Inc., 347 F.3d 693, 700 (8th Cir. 2003) (affirming exclusion of evidence gained from investigator’s questioning of defendant employees while posing as customer).

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Microsoft Corp. v. Alcatel Bus. Sys., No. CIV. 07-090-SLR, 2007 WL 4480632, at *2 (D. Del. Dec. 18, 2007)(finding violation of Rule 4.2 and imposing financial and evidentiary sanctions where counsel purchased and had installed in its office system including allegedly infringing elements and questioned installer regarding system).

“Given Mr. Lin's position and level of responsibility with respect to the Alcatel System, and because he was directed (as an employee of a represented party) to engage in conduct directly relevant to the subject matter of this litigation by [counsel] the court finds that [counsel] violated Model Rule 4.2.⁵

[5] In the alternative, [counsel] was neither forthright nor disinterested when it consciously put Mr. Lin, without the benefit of legal representation, in the unwitting position of being directed to engage in conduct that has direct consequences vis a vis his employer and the subject matter of this litigation, conduct that violates Model Rules 4.1(a), 4.3 and 8.4(c).”

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Cartier, a division of Richemont N. Am., Inc. v. Symbolix, Inc., 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005) (“[t]he 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.”)

Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 123 (S.D.N.Y. 1999) (“Gidatex had a right to determine whether Campaniello had complied with Gidatex's “cease and desist” letter dated October 16, 1997.”)

Apple Corps Ltd. v. Int'l Collectors Soc., 15 F. Supp. 2d 456, 475 (D.N.J. 1998) (“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.”)

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Meyer v. Kalanick, 212 F. Supp. 3d 437, 446 (S.D.N.Y. 2016) (“even if (contrary to the Court's interpretation) *Gidatex* and *Apple* could be read to support the proposition that investigators working on behalf of a party to litigation may properly make misrepresentations in order to advance their own interests vis-a-vis their legal adversaries, this Court would reject such a proposition. The New York Rules of Professional Conduct require lawyers to adequately supervise non-lawyers retained to do work for lawyers in order to ensure that the non-lawyers do not engage in actions that would be a violation of the Rules if a lawyer performed them”)

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[T]he Committee explained that a lawyer supervising investigators who disseminate acts unethically unless:

(i) either

(a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or

(b) the dissemination is expressly authorized by law; and

(ii) the evidence sought is not reasonably and readily available through other lawful means; and

(iii) the lawyer's conduct and the investigator's conduct . . . do not otherwise violate the [Rules of Professional Ethics]; and

(iv) the dissemination does not unlawfully or unethically violate the rights of third parties.

NYCLA Committee on Professional Ethics, Formal Opinion No. 737 (May 23, 2007)

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THANK YOU