

MINUTES

COMMITTEE: Ethics Committee

DATE: October 13, 2005

7. CHAPTER 4, RULE 1.1: WHETHER CERTAIN CONDUCT BY PRIVATE INVESTIGATOR IS PROPER

In December 1996 the Ethics Committee gave the following opinion to a lawyer:

A lawyer wishes to engage private investigators to determine whether his client's business rivals (the plaintiff in an action against his clients) are engaged in a course of conduct designed to damage the client's business and gather other evidence that may be relevant to the litigation. He has asked whether Chapter 4, Rule 1.1 of the *Professional Conduct Handbook* places any restriction on the investigation that may be conducted.

The Committee was of the view that the purpose of Chapter 4, Rule 1.1 is to prevent improvident settlements and other major capitulations of a represented party. Since the lawyer is not contemplating any negotiation with a represented party, but merely seeks to gather evidence that may be relevant in the lawsuit and that cannot be gathered except surreptitiously, the Rule is not applicable in this case. Consequently, the lawyer may instruct private investigators to gather evidence provided any communications from the investigators to employees of the defendant are not in the nature of settlement discussions. The Committee was of the view that Chapter 8, Rule 12.2 is not applicable since the lawyer would have no direct contact with any potential witnesses.

At the end of 2004 the Ontario Superior Court of Justice decided in *Cowles v. Balac* that it is improper for a lawyer to engage an investigator to undertake surveillance of an opposing party where the surveillance entails conversations between the investigator and the party. Jack Olsen asked whether the Committee wished to review the 1996 Committee opinion in light of *Cowles v. Balac*.

The Committee was of the view that it is not contrary to Rule 1.1 for a lawyer to engage an investigator to conduct surveillance of a litigant who is represented by another lawyer, even if some incidental conversation takes place between the investigator and the litigant during the surveillance. However, the Committee declined to answer the question whether it would be proper for a lawyer to engage an investigator to conduct surveillance that would require substantial conversation between the investigator and the litigant relating to facts or matters that may be in issue in the litigation. Should a specific question involving these circumstances arise in the future the Committee would be prepared to consider it.

JO/

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