

December 2006

2. CHAPTER 4, RULE 1.1: WHETHER USE OF PRIVATE INVESTIGATOR IS PROPER

In a claim by the plaintiff for damages suffered as a result of personal injuries sustained in an accident the insurance adjuster and the lawyer representing the defence hired private investigators to attend at the plaintiff's place of business in an undercover capacity for the purposes of investigating the plaintiff's claim. The investigators engaged the plaintiff in conversations touching on matters relevant to the plaintiff's claim while receiving her services in a business capacity, but did not attempt to settle the claim or induce the plaintiff to take any action concerning it. The plaintiff is represented by counsel.

The lawyer representing the defendant asked the Committee whether, in using the services of the private investigator in this manner, he has done anything improper and, if he has, what steps he must now take to deal with that impropriety.

The Committee approved of the reasoning of the December 1996 Ethics Committee which expressed the following view at the request of a lawyer who wished to engage a private investigator to gather evidence that might involve communication with a represented party:

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 noted that this opinion is consistent with the view expressed by the Ontario Court of Appeal in *Cowles v. Balac* [2006] O.J. No. 4177.

In the circumstances described by the lawyer, the private investigators did not attempt to negotiate with the plaintiff or deal with her in any way concerning the claim. In the Committee's opinion, the contacts made by the investigators were therefore proper and no special duties fall on the lawyer to take steps to mitigate any impropriety.