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PERSPECTIVES

ETHICAL AND EFFECTIVE COLLABORATION AMONG COUNSEL AND INVESTIGATORS

BY **JOHN C. KOCORAS**

> SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Companies and counsel that partner with professional investigators to gather facts in complex investigations often achieve greater results than they would have on their own. However, professional investigators' partnerships become undervalued when their successes are overshadowed by stories of bad conduct. Those problems can often be avoided through better understanding of each other's roles and responsibilities, and better communication.

Key benefits investigators contribute to complex matters are discussed below, followed by model rules of professional conduct that apply to

engagements and best practices for effective partnerships.

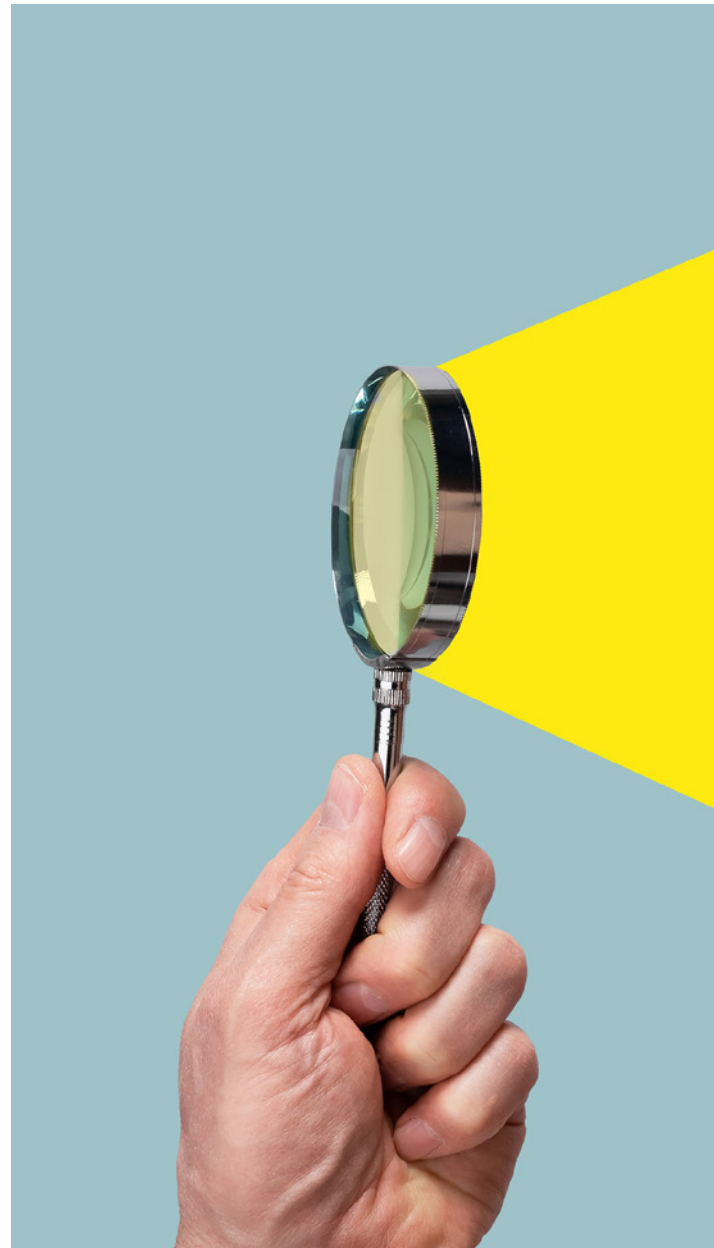
Investigators' support

Companies, counsel and investigators successfully collaborate on both 'reactive' and 'proactive' investigations. The primary objective in a 'reactive' investigation is to determine whether certain alleged facts are true. A reactive internal investigation typically involves determining the veracity of allegations of misconduct within an organisation and the scope of any such misconduct.

Professional investigators can be valuable partners in gathering and analysing data in reactive investigations. Many investigative firms include or partner with computer forensics professionals, data analysts and forensic accountants. Their participation could be critical in getting to the bottom of complicated issues and demonstrating to authorities that the organisation took appropriate steps after receiving a report of misconduct.

Reactive investigations almost always require interviews. Professional investigators can complement attorneys at interviews in various situations, including ones in which they have greater subject matter expertise, can help bridge cultural differences or language barriers, or would be better positioned to testify about the interview if necessary.

‘Proactive’ investigations seek to gather facts to identify risks and possible misconduct before any allegations are made. They include investigations of potential acquisition targets, whether performed during negotiations or behind the scenes without the targets’ knowledge. These investigations may leverage comprehensive public records research and research in commercial databases that investigators might use far more often than lawyers. Investigators’ database research can identify, among other things, past controversies and questionable relationships, including potential conflicts of interest and other factors that could affect the value of an investment opportunity. For example, investigators might



conduct a detailed review of Uniform Commercial Code filings to identify restrictions on property that could uncover financial relationships. Similarly, in evaluating the activity of a US company dependent on imports, investigators might analyse data from port import/export reporting services (PIERS), which processes thousands of bills of lading filed with US Customs daily, to get a better understanding of the company's commercial activity.

Ethical obligations

Counsel must keep in mind ethical obligations, including regarding confidentiality and supervision, when engaging or working with investigators. Ethical rules vary by jurisdiction, so attorneys should always carefully consider the specific rules that apply to them.

Protection from disclosure

Ordinarily, if a third party participates in discussions between a lawyer and client, the discussions are not considered confidential, and the attorney-client privilege does not apply. However, the third party's presence typically will not defeat a claim of privilege under US law when the third party is participating to assist the attorney in providing legal services. Likewise, when attorneys hire investigators to assist them in providing legal services, the work product doctrine

will often protect the investigators' work product from disclosure in the US. As the US Supreme Court has explained, the work product doctrine is "grounded in the realities of litigation in our adversary system", and "attorneys often must rely on the assistance of investigators and other agents" in compiling materials for litigation.

Attorneys engaging investigators should also ensure that the engagement complies with *United States v. Kovel* and other applicable law. Specifically, counsel often should hire the investigator directly; the purpose of the engagement should be memorialised in writing; and the engagement letter should make clear that the investigator is assisting with the provision of legal advice and is acting at the direction of counsel and, as such, any reports are covered by attorney-client privilege and work product protections. Attorneys must also make sure to oversee and direct the work throughout.

Privilege and work product protections, along with appropriate *Kovel* frameworks, can vary by jurisdiction, and lawyers should review the standards in their own jurisdiction to maximise potential protections.

Applying lawyers' professional obligations to investigators

Among the most important rules attorneys and investigators must know is that an investigator

"Not only are lawyers prohibited from inducing someone else to engage in deceptive conduct, ratifying deceptive conduct could itself be misconduct."

engaged by an attorney generally may not do anything that the attorney is prohibited from doing. American Bar Association Model Rule of Professional Conduct 8.4(a) explicitly states that a lawyer may not induce another person to violate or attempt to violate a rule of professional conduct that applies to the lawyer. Rule 5.3 provides that a lawyer having direct supervisory authority over a nonlawyer must make reasonable efforts to ensure that the person's conduct is compatible with the lawyer's professional obligations. Under these rules, if a person engaged by a lawyer violates rules that apply to the lawyer, the lawyer may be responsible for the conduct as if the lawyer engaged in the conduct directly. Courts

have made clear that the conduct of investigators engaged by attorneys falls within rules 8.4(a) and 5.3. (“[I]n general, what a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer’s stead.”)

Consequently, professional investigators generally may not communicate directly with parties represented by counsel about the subject of that representation. When working at the direction of attorneys, investigators are generally subject to model rule 4.2 or its local equivalent, prohibiting communication with a represented party about the subject of the representation unless that party’s lawyer has consented or the communication is authorised by law or a court order.

Cases involving investigative missteps make clear that close contact between attorneys and investigators throughout the investigation is essential. Because complex investigations routinely involve unexpected developments and lawyers have these oversight obligations, lawyers and investigators should collaborate on a written work plan that includes the methods the investigators intend to use to gather facts. Lawyers should ensure that the work aligns with their goals, minimises reputational risks, and complies with the lawyers’ standards and professional obligations. The written work plan should be updated as circumstances change, and the lawyer and investigator should discuss those changes in advance.

Prohibitions on harassment and deception

When attorneys’ work with investigators is discussed in news media, it is often because a party on the other side of the dispute is alleging that investigators were engaged to harass them. If such allegations were true, the lawyer could be violating rule 4.4(a), which prohibits lawyers from conduct that has no substantial purpose other than embarrassing or burdening another person. That same rule prohibits lawyers and investigators they supervise from using methods of obtaining evidence in violation of someone’s legal rights. Obtaining evidence through unlawful recording, unlawfully accessing electronic data, or misstatements all could violate this rule.

Among other restrictions, professional investigators generally cannot use deception, including ‘going undercover’, when partnering with attorneys in the private sector. Model rule 8.4(c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Additionally, model rule 4.1 prohibits attorneys from knowingly making a false statement of material fact or law to a third party in the course of a representation. Not only are lawyers prohibited from inducing someone else to engage in deceptive conduct, ratifying deceptive conduct could itself be misconduct.

Courts in some jurisdictions have recognised limited exceptions allowing investigators to work

'undercover' where the investigation's purpose is to identify discriminatory practices or trademark and patent infringements. For example, courts, including the Supreme Court, have approved in specific cases the use of housing 'testers' who hide their motives of renting or buying a house to reveal housing discrimination. Because any 'undercover' exception to the prohibition on deception is limited and can vary from jurisdiction to jurisdiction, and considering that investigators' conduct can be imputed to lawyers, comprehensive legal research should be conducted before working with investigators who might engage in any form of deception, no matter how noble the reason might seem.

Investigation reports

Lastly, lawyers and investigators should explicitly discuss whether a final written report of the investigation is necessary. Even if no final written report is prepared, investigators should document

the methods they used to gather facts and preserve that information. Investigations that successfully uncover critical facts or involve analyses that identify relationships people tried to hide are often met with claims that the investigators are lying or broke the law. Documented investigation methods will go a long way to refute those claims if needed.

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John C. Kocoras

Partner

Skadden, Arps, Slate, Meagher & Flom LLP

T: +1 (312) 407 0770

E: john.kocoras@skadden.com