

Biting the Hand that Feeds You:

An undercover investigation gone bad may result in evidentiary and monetary sanctions

By Jennifer B. Bechet

"No one had any intention of doing anything unethical or improper," assured South Dakota attorney Jerry L. Pollard in a recent interview for PI Magazine. "Just go in off the street, ask what's best, what sells and why prefer this one over that one."

Despite the best of intentions, the commonplace activities of Attorney Pollard's former client Adrian Mohr, formerly of Adrian Mohr Investigations, Inc., were at the heart of a federal judge's decision to throw out tape-recorded evidence, exclude testimony and even to consider slapping the attorneys and client with monetary sanctions. As an "interested party" in Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., Mohr was represented by counsel. He also sat for a deposition in which he explained the nature of his

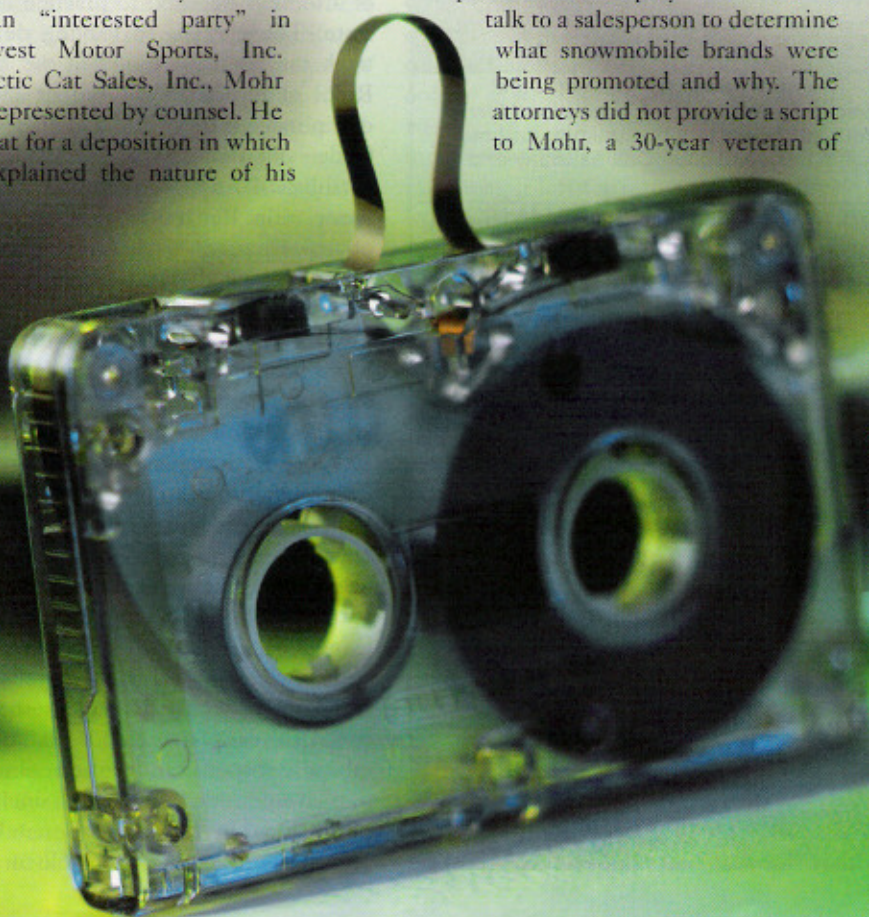
assignment, what information attorneys provided to him and the means by which he obtained tape-recorded evidence to be used in the civil trial. Attorneys even took the deposition of Mohr's wife.

The case began as a straightforward lawsuit against snowmobile manufacturer Arctic Cat brought by its former dealer Elliott. But the case took an acrimonious turn after the dealer's attorneys learned that, with an eye towards trial, the manufacturer's attorneys had hired private investigator Mohr to obtain information. According to deposition testimony, Mohr had been directed to visit the dealer's showroom, observe the products on display there and to talk to a salesperson to determine what snowmobile brands were being promoted and why. The attorneys did not provide a script to Mohr, a 30-year veteran of

the Federal Bureau of Investigation. Rather, they informed him of certain subject matter to be discussed, including comparisons of competitors' products. Mohr was directed to see whether the dealer would make negative comments about a competitor, among other things. Mohr told the attorneys that he intended to wear a hidden recording device to record the conversations—which is legal in South Dakota.

Mohr and his wife, posing as customers, visited the showroom of snowmobile dealer A-Tech. A-Tech's owner immediately introduced himself and engaged in a tape-recorded conversation with the couple. On two subsequent occasions, while accompanied alternately by his wife or daughter, Mohr visited dealer Elliott's showroom. Mohr asked questions "designed to allow (Elliott's salesman) to extol the qualities of the competitor's snowmobiles" and talked to the salesman about the reasons Elliott sells competitors' snowmobiles. According to the court opinion, following each visit, Mohr met with the manufacturer's attorneys, provided the recorded tapes and discussed upcoming visits.

*** Note:** This article's contents are intended for general informational purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have.





Generally, an attorney is ethically responsible for those actions he directs or ratifies or when he has direct supervisory authority over the person.

According to Attorney Pollard, it was a benign exercise. Mohr "just went in as a customer to ask questions; didn't seek anything from the salesman out of the ordinary, just ordinary everyday questions."

The dealer's attorneys, however, complained to the court that the manner in which this evidence was obtained violated the rules of ethics governing the conduct of attorneys practicing in South Dakota. As a result, the trial judge excluded Mohr's tape recordings and any testimony by Mohr, his wife and daughter. The judge also excluded any additional evidence that the manufacturer had obtained as a result of the taped conversations. Despite the fact that the underlying lawsuit eventually settled out of court, the judge still considered imposing separate monetary sanctions against the manufacturer and

its attorneys. Both the trial judge in 2001 and a reviewing court in 2003 reasoned that Mohr's interviews with the dealer's salesman and with the other dealer's owner was improper communication with a represented person in violation of the ethical rules. The court reasoned that because the attorneys themselves were prohibited from contacting the interviewees without the consent of the dealers' attorneys, the investigator, acting as the agent of the manufacturer's attorney was also prohibited. Despite the manufacturer's attorneys' protestations that they had directed Mohr to speak with low-level salespeople only and to ask ordinary everyday questions, the court found that Mohr had visited the dealer's showroom "to elicit specific admissions from (the dealer's) employees" about its sales of the manufacturer's snowmobiles." The reviewing court also found that while legal, the surreptitious taping was deceitful and cause for sanctions when combined with the other unethical conduct.

This case may not be the aberration it appears. Like South Dakota, each state has rules of ethics governing the conduct of attorneys licensed to practice in that state. These rules, to varying degrees, track the language found in the Model Rules of Professional Conduct and the disciplinary rules ("DR") of the Model Code of Professional Responsibility established by the American Bar Association. Per the rules, in the course of representing a client, an attorney cannot knowingly make a false statement of material fact or law to a third person. [Model Rule 4.1(a) and DR 7-102(A)(5)]. More broadly, the rules prohibit deceit, misrepresentation and fraud by an attorney. [Model Rule 8.4(c) and DR 1-102(A)(4)]. An attorney is also prohibited from communicating with someone known to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so. [Model Rule 4.2 and DR 7-104(A)(1)]. This includes certain employees of a company represented by an attorney.

Also, each state holds an attorney ethically responsible for the actions of a non-lawyer working with him—including professional investigators. Generally, an attorney is ethically responsible for those

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actions he directs or ratifies or when he has direct supervisory authority over the person [Model Rule 5.3]. In a nutshell, an attorney cannot do an end-run around the ethics rules by directing a non-lawyer to engage in the activities forbidden under the rules [Model Rule 8.4(a) and DR 1-102(A)(2)]. Consequently, if an investigator engages in conduct that, if performed by an attorney, would violate the ethical rules prohibiting contact with represented persons and misrepresentation, fraud, and deceit then occurs, evidentiary sanctions and/or monetary sanctions for the attorney and client may result.

The restrictive view of the South Dakota federal district court and the appellate court appears at odds with a New York federal district judge's conclusion that "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation." In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, a 1999 case interpreting New York's disciplinary rules, furniture manufacturer *Gidatex* sued *Campaniello*, a former distributor of its furniture line. The manufacturer's attorney used two private investigators to pose as interior decorators—the typical customers of the distributor—and secretly record conversations with the distributor's sales clerks. Since the goal was to use the statements to impute liability to their employer, the sales clerks were represented persons and thus communication with them otherwise would be off-limits. However, the court excused this activity because the investigators "did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in [the distributor's] showroom and warehouse."

Similarly, in *Apple Corps, Ltd. v. International Collectors Society*, a 1998 case interpreting New Jersey's ethics rules, plaintiff's attorney sought to determine whether a direct marketer was selling stamps bearing the Beatles' likenesses. The attorney directed a private investigator, among others, to call the marketer and try to order stamps. The federal district court in New Jersey found that an attorney is not prohibited under Rule 4.2 from seeking to uncover

corporate misconduct by posing as a member of the general public, either directly or via an investigator, and engaging in ordinary business transactions with low-level employees of a represented corporation.

So, where is the bright line between what is permissible and what is not? A federal court in Illinois suggests that none exists but rather "there is a discernable continuum in the cases from clearly impermissible to clearly permissible conduct. Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They cannot normally interview protected employees or ask them to fill out questionnaires. They probably can employ persons to play the role of customers seeking services on the same basis as the general public." That court's 2002 decision was made in the context of a civil lawsuit alleging that Shell stations discriminate against African-American customers by requiring that they prepay for gasoline. White customers, on the other hand, allegedly were allowed to pay after pumping gas. To prove their case, plaintiffs had investigators and others pose as customers. Most of the questioning of Shell's employees was only as to whether a particular gas pump was prepay or not. The court found these interactions did not violate the rules. However, it left for future consideration whether to exclude from trial any "substantive conversations outside of normal business transactions."

If not careful, an investigator's covert investigation can result in acrimonious proceedings, monetary sanctions against the client and the attorney with whom he works, as well as exclusion of the very evidence he went undercover to obtain. To avoid biting the hands that feed him, an investigator should discuss, and in some cases educate the attorney about, the ethical rules and how a court or disciplinary panel might interpret them in their particular jurisdiction.

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