News You Can Use
"Ethical Dilemmas and Other Challenges for PIs"

The monthly WALI meeting on October 21, 2004 featured a panel of guest speakers including: defense attorney Carolyn Ramamurti, WALI member Kris Cappel, Seabold Group, and WALI member Linda Montgomery, Linda Montgomery Investigations, speaking on ethical dilemmas and other challenges encountered by PIs in the course of their business dealings.

Attorney Carolyn Ramamurti, a former ethics committee member for the Washington State Bar Association, discussed the investigator's role when working with an attorney.

Ramamurti began her presentation by explaining that in order to practice law in the US, an attorney must operate according to a certain level of ethical standards and must belong to a state bar association. In Washington State these standards are outlined in the Washington State Court rules, Rules of Professional Conduct. In large part, these rules have been adopted from those compiled by the American Bar Association, a voluntary organization.

She discussed that a lawyer is responsible for providing competent representation to a client. Lawyers also have an obligation of fairness to their opposing party and counsel. While a witness is entitled to have representation present during an interview by opposing counsel, it is unethical for an attorney to tell a witness not to talk to the other side.

She also talked about Rule 3.5 regarding *impartiality and decorum of the tribunal*, which bars lawyers seeking to *influence a judge, juror, or prospective juror*. Ramamurti said that this same rule applies to investigators.

A particularly important rule outlined by Ramamurti is 4.3, *dealing with an unrepresented person*. An investigator has to identify themselves as working for the attorney who hired them and be clear about why they are there. The rule states that *a lawyer shall not state or imply that the lawyer is a disinterested party.*

The last statute outlined by Ramamurti was Rule 8.3. She referred to this as the "mandatory snitch rule". *If an attorney has knowledge that another attorney's violation of the Rules of Professional Conduct that raises substantial question as to that attorney's honesty, trustworthiness or fitness as a lawyer in other respects, should promptly inform the appropriate professional authority (Washington State Bar Association).*

Article by WALI member Michael Hawkins discussed.

Attorney Ramamurti discussed some of the issue raised in the article written by WALI member Michael Hawkins. Rule 5.3 regarding responsibilities of non-lawyer assistants, speaks directly to investigators hired by attorneys for assistance on their cases. As outlined in the article *Do The Legal Canons of Ethics Impact On Investigators* by Michael Hawkins states, investigators hired by attorneys should be held to the "supervision or control" standard. Hawkins states, "Even when the investigator is neither "supervised" nor "controlled" by the attorney, there is the possibility that the attorney could "ratify" the conduct and therefore be held responsible". This rule can be applied when opposing counsel is seeking to have findings from an investigation excluded from a trial.

Hawkins outlined rules applicable to Washington State lawyers that are important for investigators to be aware of:

1. Contacts with represented persons (Rule 4.2). In Washington State lawyers are prohibited from communicating with a person whom the lawyer knows is represented about the subject matter of the case.

Some common questions for investigators that arise from this rule as outlined by Hawkins are: If the witness is employed by the corporation being investigated are they considered to be represented by their general counsel? According to Hawkins, in general, *the fact that the corporation is represented does not mean that the corporation is represented with respect to the subject matter of your particular investigation into a specific incident or practice.*

A. Is it necessary to ask every single person you wish to contact if they are represented by an attorney? *In most cases this is not necessary but if you have a reason to believe that the person is represented, you should ask.*

B. What constitutes a "communication" and when are you authorized by law to communicate with a represented person? *According to the rule, a communication can consist of listening and writing or even receive a letter from a represented individual. This rule has been interpreted to mean that an investigator may communicate with a represented individual if a* *specific law, court order, or a previous decision of the court within the jurisdiction would permit it.*

2. Methods of obtaining evidence (Rule 4.4). *Investigators must not use methods that violate another person's rights (constitutional and statutory laws plus privileges recognized by case law) to obtain evidence*.

3. Rules regarding trial publicity (Rule 3.6). *A lawyer or investigator shall not make any statement beyond the usual course of legal proceedings that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it would have a substantial likelihood of materially prejudicing trial proceedings.* This rule attempts to ensure a fair trial proceeding and if it is violated, a reversal in a criminal conviction or the tabling of a civil suit can result.

3. The "Honesty" Requirement (Rule 3.3). *This requirement goes further than simply telling the truth. It may also require that information later proved to be false be corrected on the record. For example, if information obtained, whether it be through an investigator or another non-lawyer assistant, supplies information such as through an affidavit, and, the affidavit does not tell the entire story, the case and attorney could suffer. An example of this could be if a witness provides a deposition and later learns that the information recorded in the deposition is not accurate.*

An important rule often overlooked by attorney is 8.4 that involves an individual's moral conduct in and outside of their profession. Attorneys are required to refrain from *acts involving moral degeneracy, corruption, or any unjustified act of assault which reflects a disregard for the rule of law, whether the same be committed in the course of their conduct as a lawyer, or otherwise, and whether the same constitutes a felony, misdemeanor or not; and if it does, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding…*

WALI member Kris Cappel, Director of Seabold Group and former Federal Prosecutor, highlighted the fact that as investigators, we need to make a conscious decision about our professional conduct and what is right.

Things that are not only unprofessional but also illegal, are investigators impersonating law enforcement. Cappel said that in order to make it clear to a witness who you are and who you represent "hit them over the head with it" by telling them verbally, giving them a card, or having them sign a statement. So many times witnesses will come back later and say that they thought the investigator was working for their side or law enforcement even when they were repeatedly informed of the contrary. Capple said that people don't necessarily do this intentionally, often people will automatically assume that the word investigator means you are working for law enforcement.

By law, investigators are required to maintain attorney client confidentiality and this includes protecting case files. Cappel said to be sure and label the files CONFIDENTIAL so that there are no questions if someone checks up on your record keeping. Files need to maintained under lock and key in fireproof containers. Even after the case is closed, the files remain privileged. Cappel raised the question of what to do if maintaining confidentiality will cause bodily harm, injury, or death. In a case such as this and depending on the situation, Cappel suggested to report the situation anonymously or by "association".

Regarding conflict of interest, Cappel said that keep good records of who your clients are as well as the identities of the adverse parties to avoid the possibility of them retaining your services later.

Cappel cautioned against being hired as a third party by an individual who is trying to get around a no contact order.

Cappel advised investigators to keep in constant contact with the attorney regarding questionable areas because the attorney is responsible for the investigator's conduct.

The dilemma of working with inefficient attorneys was discussed.

Regarding the ethical issue of an imminent trial and an attorney's apparent lack of preparation, Linda Montgomery said to "tactfully let the attorney know when you feel there is a problem". For example, you could ask the attorney, "Would you like for me to help you set up these witness interviews?"

Before reporting an attorney regarding an ethical issue, get the advice of other investigators, professional associations (such as WALI) or attorneys and make sure your perception of the problem, that a problem exists, is warranted. WALI member Linda Montgomery, Director of LMI Inc, presented handouts titled *Guides for PIs* and *Staying Out of Trouble*. Montgomery emphasized that the attorney is the client (not the defendant) and that investigations should be cautious about making judgments about the attorneys handling of the case.

The following Issues were raised by investigators in attendance and discussed as follows:

Regarding search warrants and searches and **seizures of investigator privileged information**, law enforcement must have a search warrant listing specifically what the warrant is for and provide you with a copy of the warrant. They are only allowed to seize the items listed on the warrant. The information can be seized but they cannot review it until the county grants them authorization.

Several scenarios in regard to ethics were presented by investigators and addressed. Due to confidentiality issues names and specific details have been omitted. One question presented was what if an investigator found incriminating information while working on a case for one client and already had a second client who would be adversely affected if the information found was not known by them. The panel's response was that the investigator could "strongly advise" the client to investigate the situation using another investigator and possibly refer them to another investigator. The investigator could also ask permission from the first client to share the information with the second client.

Another question raised was what if a client gives you something (evidence) to hold for them. If it is evidence (such as a possible murder weapon) the investigator is required to turn it over to prosecutor but not provide any information about it. In a situation where nobody has been charged and a client wants to give the investigator something like tax returns, the investigator can take them. It is advisable to stamp the documents with the date they were received.

A question was raised about an attorney who provided information about an informant to her client who was in jail. The investigator felt that this put the informant's safety inside the jail at risk. Does the attorney have an ethical obligation to protect the informant? Attorney Ramamurti said as an attorney it is their obligation to provide legal assistance to their client and if providing the identity of the informant would assist their client, then that is their obligation (and they are under no obligation to protect the safety of the information).