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OUTSIDE COUNSEL

BY JOEL COHEN

Working With a Private Eye

Paul Drake wore Brooks Brothers suits and crisp white shirts. Never secretly taped a witness. Never solved a witness' reluctance with a handful of cash—the perennial solvent of reluctance. No improper payback from a "contact on the job, downtown" who owed him a "solid" for favors past. And forbidden eavesdropping? Not a chance!

Why would he need to? He was, after all, the ace investigator for television's Perry Mason, the only criminal lawyer with no guilty clients—so why would the venerable Mr. Mason need to rely on a private eye who resorted to sleaze or worse? "Truth, Justice and the American Way" were enough to unearth the facts and spring the innocent.

Those were different times (an age before Google and the many (often, free) services now available)—a time of innocence, indeed.

Damon Runyon Characters

For most of Hollywood, however, the portrayal of the private eye has been otherwise. He's a contrarian, down on his luck and operating in the shadows—Damon Runyon characters. Too much scotch flowed through his veins, poured by "Joe" during benders spurred on by a broken marriage ("The only dame I ever loved"). Rumpled, yet slick, he was "'flopped off the job' taking a bullet for a partner who didn't deserve going down on a bad rap."

He'll throw cash around to pry information from its moorings, perhaps from an aging hooker with a heart of gold—a former snitch when he was a detective, whose evidence he "lost" after she gave him inside dope on a perp. Or he sweet-talks an ingenuous bank clerk to believe that he's still a cop in order to gain confidential records. Maybe his guile gets a witness' phone records from a phone company clerk.

And if Hollywood is going for the gusto, viz., Gene Hackman in "The Conversation," he'll tape the unsuspecting to get the job done.

Most private eyes don't play by Hollywood's rules. They can't. Since they lack law enforcement's power to influence a reluctant witness—with the threat of prosecution, the promise of a deal, or the offer of protection—they need to do something else to get the job done, and play on the "contacts" they've made over the years.

Though there are bad apples, most private investigators use only proper means. Even putting aside the well-regarded operations laden with ex-FBI executives, many one-man shops also comport with the law. But, still, issues arise.

The 'Pellicano' Case

Although there are bad apples among them, most private investigators dig up stuff using only proper means. Even putting aside the significant, well-regarded "white collar" operations laden with former FBI executives and the like, many one- or two-man shops also comport with the law. But still, issues sometimes arise.

Recent events have raised the consciousness of lawyers, particularly criminal and divorce lawyers who employ private investigators on a regular basis.

In Los Angeles, high-profile lawyers have come under investigation—with one already indicted—for knowingly obtaining the fruits of illegal wiretaps and bugs installed by Anthony Pellicano, a now-jailed, private eye to the stars.[1]

A detailed indictment of Mr. Pellicano, who in the past has been employed to gather information on movie and TV stars such as Sylvester Stallone, Gary Shandling and Keith Carradine, now includes as a codefendant, prominent L.A. lawyer, Terry N. Christensen. It alleges illegal bugging installations and "overheards," and cash bribes to now-indicted Los Angeles Police Department (LAPD) personnel to gain criminal identification information.[2]

The third superseding indictment that now charges Mr. Christensen graphically describes his role in the conspiracy. Mr. Christensen represented Kirk Kerkorian, Hollywood bigwig, in a messy custody battle against his ex-wife, Lisa. The indictment alleges that Mr. Christensen paid Mr. Pellicano some $100,000 to wiretap Lisa's phone and thereby access the strategy conversations between Lisa and her lawyer.[3]

But the Pellicano/Christensen attorney-client privilege violation is nothing compared to the real allegation implicated, that is, that Mr. Christensen knew precisely what Mr. Pellicano was doing: He was "hearing both sides, you know, I'm hearing her talk to Kirk [Kerkorian] too. That's not for…distribution, but I'm hearing both of them, I'm hearing all of it, the whole nine yards."[4]

It's hard to predict Mr. Christensen's defense given the details in the indictment. He will be hard-pressed to argue that he simply believed that Mr. Pellicano innocently sat in the next room with a glass up against the wall while Lisa Kerkorian and her lawyer discussed strategy.

Eavesdropping—in New York, for example,

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the bugging of a room or the wiretap of a phone line without consent to the interception by at least one party to the conversation—is flatly criminal under New York[5] and federal law.[6]

Meaning—if a lawyer who retains a private investigator is told by him, or with "willful blindness" deliberately refuses to come to terms with what has been hinted at to him, i.e., that the investigator secretly recorded what he has no legal right to record, the lawyer deserves what he gets. It's a crime, and by paying, or just receiving, the information, he becomes an aider and abettor—even without listening to the conversations or reading transcripts.

To be sure, responsible investigators will have nothing to do with such business, but one cannot always be sure with whom he's dealing. Suppose the lawyer is told by the investigator, "I do what I have to do, don't ask so many questions." Some circumstances relating to the lawyer's state of "knowledge" will suffice to sustain an indictment on a theory called "deliberate blindness" or "conscience avoidance of knowledge."[7]

Means PIs Should Not Use

Putting illegal eavesdropping aside, there are other, less clear-cut means that private investigators should never use, and the lawyers who hire them should likewise be wary. They include:

- Relying on an "old friend downtown" to acquire confidential police information;
- Paying a phone company employee to secure confidential records, or paying a brokerage firm "tech" person for copies of tapes of customer calls to his broker;
- Drawing on the "favor bank," meaning, at a minimum, a bank security officer's breach of federal civil statutes and administrative provisions, the bank's internal rules and possibly applicable state and federal criminal statutes,[8] to learn precisely how much money exists or existed at a particular moment in the bank account of a key witness against your client;
- Taping a witness who demands that the conversation with him not be taped and gains specific assurances from the PI that he won't be taped;
- Using false pretenses, which is also unethical if on a lawyer's watch, perhaps by simply letting a witness reach the wrong conclusion by quickly flipping a PI's credentials to suggest he is a police detective or federal agent —or, worse, directly lying to the witness; or
- Telling a witness with potential deportation problems, in what amounts to extortion,[9] that "the immigration people might curiously get 'interested' in you if you don't give me the confidential documents I want."

The majority of private investigators engage in none of this stuff; same with the majority of law enforcement officers. Some, however, do, on both sides of the aisle. And just as experienced prosecutors, even honorable ones, are sophisticated enough not to ask too many questions, most lawyers in private practice—honorable ones, to be sure —don't either.

Why the need for such tactics? For one, many prosecutors are extremely stingy or strategically dilatory about their *Brady* (exculpatory evidence) obligations[10]—an Irish prosecutor I used to know saw *Brady* as "just another Irish name." And while an ex parte trial subpoena duces tecum in advance of trial may be possible, the defense lawyer may not want to tip his hand to the prosecutor who will invariably, under Federal Criminal Rule 17(c),[11] glean what the defense lawyer has subpoenaed before trial. Or, where no indictment has been filed and the lawyer wants to gain information to persuade the prosecutor not to proceed, a pre-indictment defense subpoena power does not exist. And, very important, a subpoena from a defense lawyer (unlike a grand jury subpoena from a prosecutor) cannot compel or effectively compel an individual to actually speak—meaning, give an interview—to the defense lawyer or his investigator. There's no private practice grand jury!

An Envelope on Your Desk?

So, what is a private lawyer to do when, unsolicited, he finds an envelope on his desk one morning, containing copies of the bank records of the key witness? Clearly, the material was not gained from the prosecutor or any pretrial subpoena duces tecum that the lawyer issued. There is perhaps just a polite smile from his PI that asks, "Boss, did I do alright?" How would the lawyer explain how he thought the private eye came to possess the records? And is the issue any different if he gets a "report" from the PI of what such records show but not the records themselves? Could he just accept the PI's explanation: "Nothing illegal, I just don't want to burn my source?"

Without a doubt, counsel may not know, and certainly would not want to know, if the PI paid someone to get the information. It would be classic "bribery of a public servant"[12] if the documents were obtained by paying someone at the PD, or at least a "commercial bribe"[13] if paid to a phone company or bank employee. Specific knowledge that a payment was made would implicate counsel especially if he uses the material. And it is likely a violation of federal criminal law relating to illegal computer access if they are bank records, even if the records were given, free of charge, to the PI.[14]

But short of that—and it is, of course, quite unlikely that a PI would ever say, "I gave you records that we shouldn't have"—where does the lawyer in private practice stand in these circumstances?

It's not always clear. For instance, even when information is gained without illegality or payment (i.e., "An old friend downtown at the PD tipped me off that the witness had an arrest that was expunged"), the information is not properly received. Its disclosure was still likely in contempt of court, e.g., the court's sealing order, and probably in violation of the PD's computer regimen. Here, too, the lawyer "don't wanna know nuthin'" but the bottom line. Lawyers particularly won't want to know if a PI, without disclosing his true identity, talks to an unsophisticated codefendant already represented by counsel, which, if with advance knowledge, would likely violate the lawyer's duty to communicate only with counsel.[15]

Conclusion

Practically speaking, the savvy private investigator knows what not to tell the lawyer. If he believes the lawyer wouldn't want to know something, he simply says: "'My intuition' tells me we ought to subpoena the records of ABC Bank for any offshore wire transfers by our boy."

And the savvy lawyer knows not to ask when dispatching the PI. He simply says: "See what you can come up with on Joe Blow…. You know what I'm looking for," leaving the rest to the imagination or creativity of the investigator.

Of course, the virtuous lawyer might sternly insist, "No funny business! Clean information or nothing at all!," perhaps listing the impermissible tactics to be avoided. However, in the majority of cases, the message from attorney to private investigator is inelaborate. He indicates the target, the subject matter, and if the attorney thinks to go the extra mile to cover his own backside, he adds: "No funny business. I want your information to be straight. Period."

But he rarely goes into specifics—and for that reason, and not despite it, he usually gets what he needs.

Be careful!

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1. David M. Halbfinger and Allison H. Weiner, "Celebrity Lawyer in Talks About Wiretapping Evidence," N.Y. Times, Feb. 25, 2006, at B7.
2. Third Superseding Indictment, *United States v. Pellicano*, CR No. 05-1046 (filed Feb. 15, 2006).
3. Id. at 54-61.
4. Id. at 57.
5. N.Y. Penal Law §250.05 (2006).
6. 18 USC §2511.
7. See FED-JI §17.04; *United States v. Finkelstein*, 229 F.3d 90, 95 (2d Cir. 2000) (one who deliberately avoided knowing the wrongful nature of his conduct is as culpable as one who knew).
8. See, e.g., 15 USC §6801; 18 U.S.C. §1030; 31 C.F.R. §103; 12 U.S.C. §3401 et seq.
9. N.Y. Penal Law §155.05 (2006); 18 U.S.C. §875.
10. *Brady v. Maryland*, 373 U.S. 83 (1963).
11. Fed. R. Crim. P. 17(c).
12. N.Y. Penal Law §§250.00-.04 (2006).
13. N.Y. Penal Law §§180.00-.03 (2006).
14. 18 U.S.C. §1030(a)(2)(A) (punishing "Whoever intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information contained in a financial record of a financial institution").
15. DR 7-104.