The Ethics of Civil Practice Investigations - Part I

"Pretexting Ain't What It Used to Be"

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If you follow the business news, you heard a great deal about the Hewlett-Packard board of directors' flap involving an investigation ordered by the chairman of the board to determine who was leaking confidential board meeting discussions. The investigation was conducted by private investigators under the supervision of a senior house counsel in HP's general counsel office. Among other investigative methods, the private investigators used pretexting (using someone else's identity to obtain information, goods, or services) to get telephone records of members of the board of directors. The end result was that the chairman of the board, the senior house counsel, and several of the private investigators were indicted under California law for fraudulent wire communications, wrongful use of computer data, and pretexting. The chairman of the board defended herself by asserting that she had been advised by house counsel that all investigative methods used were lawful.

This high profile case resulted in new emphasis on the ethics of what has been called deceptive lawyering.[1] What are the legal and ethical implications of use of misrepresentation, subterfuge, tape recording, undercover operatives, surveillance, eavesdropping, and dumpster diving when investigating a matter? Does it make a difference if the lawyer is doing the investigating or nonlawyers are employed to conduct the investigation? If the investigative method is legal, but unethical, does a lawyer's duty to his client override professional responsibility rules? The answer to these and other questions are muddled by the confusion of laws that might apply to a given investigation, inconsistent professional responsibility rules, renewed aggressiveness by government officials in enforcing privacy and consumer protection laws, and the likelihood of new laws and regulations in the future.

The purpose of this two-part article is to highlight the major legal and ethical considerations in civil practice investigations and place you in a position to ask the right ethics and risk management questions when undertaking an investigation. The practice policy advocated is that a lawyer should ask three questions when embarking on an investigation:

- Are the methods of investigation legal?
- Are the methods of investigation ethical?
- Are the methods of investigation smart?

Part I begins with an overview of lawyer investigative competence. It includes a brief review of the risks an incompetent investigation can create and addresses the question "Are the methods of investigation legal?" Part I concludes with a review of the question "Are the methods of investigation ethical?" concerning the ethical issues a lawyer faces as an investigator.

Part II, to be published in the next edition of the *Bench & Bar*, completes consideration of the question "Are the methods of investigation ethical?" by reviewing the ethics issues when a lawyer supervises an investigation. It then covers the question "Are the methods of investigation smart?" Part II concludes with suggestions for investigation risk management. Not considered in this article are criminal or government investigations and those aspects of civil investigations covered by rules of civil procedure.

Lawyer Investigation Competency and What Can Go Wrong

The lawyer skills required for conducting a competent factual investigation are identified in the ABA's MacCrate Report on legal education as follows:

> In order to plan, direct, and (where applicable) participate in factual investigation, a lawyer should be familiar with the skills and concepts involved in:
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> - Determining the need for a factual investigation. (*Evaluation of the information in hand and applicable law to determine if more factual information is needed*.)
> - Planning a factual investigation. (*Consider degree of thoroughness required in light of purpose of the investigation, time available, client's resources, etc*.)
> - Implementing the investigative strategy. (*Consider hiring investigator, interview fact witnesses, document analysis*.)
> - Memorializing and organizing information in an accessible format. (*Appropriately correlated to legal analysis*.)
> - Deciding whether to conclude the process of fact-gathering. (*Includes consulting with the client about lawyer's judgment that investigation should be concluded*.)

- Evaluating the information that has been gathered. (*Assess accuracy and reliability, identify inconsistencies and possible reasons for them.*)[2]

When applying these investigative skills lawyers face several risks. Using illegal investigative methods can lead to criminal indictment as the HP case illustrates. Methods that violate the Kentucky Rules of Professional Conduct (KRPC)[3] risk bar disciplinary action. An inadequate (read negligent) investigation will draw a malpractice claim. Intrusive investigations that overstep privacy and consumer rights open the door to civil suits. Investigative techniques that offend a judge can result in evidence suppression, disqualification of the lawyer, and court-ordered sanctions. From this fierce list of what can go wrong in an investigation, it is obvious that lawyers must know what they are doing when conducting or supervising an investigation — or face the consequences.

Are the Methods of Investigation Legal?

Answering whether an investigative method is legal involves that most difficult of all research problems – determining that no law forbids it. A number of federal and state laws could be implicated by any given investigation (e.g., criminal laws, telecommunications laws to include the Internet, consumer protection laws, and laws that protect the right of privacy). What follows is information on some of the laws concerning pretexting, consumer protection, and eavesdropping. A review of all possible laws that might apply to investigations is beyond the scope of this article and as practical matter may not be feasible.

***Pretexting*:** The Federal Trade Commission takes an aggressive position on pretexting as shown in this extract from a FTC Fact Sheet for the general public:

Pretexting: Your Personal Information Revealed

When you think of your own personal assets, chances are your home, car, and savings and investments come to mind. But what about your Social Security number (SSN), telephone records and your bank and credit card account numbers? To people known as "pretexters," that information is a personal asset, too.

Pretexting is the practice of getting your personal information under false pretenses. Pretexters sell your information to people who may use it to get credit in your name, steal your assets, or to investigate or sue you. Pretexting is against the law.

How Pretexting Works

Pretexters use a variety of tactics to get your personal information. For example, a pretexter may call, claim he's from a survey firm, and ask you a few questions. When the pretexter has the information he wants, he uses it to call your financial institution. He pretends to be you or someone with authorized access to your account. He might claim that he's forgotten his checkbook and needs information about his account. In this way, the pretexter may be able to obtain personal information about you such as your SSN, bank and credit card account numbers, information in your credit report, and the existence and size of your savings and investment portfolios.

Keep in mind that some information about you may be a matter of public record, such as whether you own a home, pay your real estate taxes, or have ever filed for bankruptcy. It is not pretexting for another person to collect this kind of information.

There Ought to Be a Law — There Is

Under federal law — the Gramm-Leach-Bliley Act — it's illegal for anyone to:

- use false, fictitious or fraudulent statements or documents to get customer information from a financial institution or directly from a customer of a financial institution.
- use forged, counterfeit, lost, or stolen documents to get customer information from a financial institution or directly from a customer of a financial institution.
- ask another person to get someone else's customer information using false, fictitious or fraudulent statements or using false, fictitious or fraudulent documents or forged, counterfeit, lost, or stolen documents.

The Federal Trade Commission Act also generally prohibits pretexting for sensitive consumer information.[4]

At the state level KRS 367.170 in the Consumer Protection chapter provides: "Unlawful acts. (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." I found no case applying this law to lawyers, but be aware that the law exists and appears to cover pretexting.[5]

***Fair Credit Reporting Act*:** Obtaining consumer reports in violation of the federal Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.) is another major pitfall for lawyers investigating a matter. The FCRA carries both criminal penalties and civil damages. Damages include actual damages sustained by the consumer, punitive damages, and costs and reasonable attorney's fees for the successful plaintiff. The law has a two-year statute of limitations. Lawyers have tripped over the FCRA in these situations:

- Obtaining a credit report in a divorce proceeding (*Berman v. Parco*, 986 F. Supp. 195, S.D.N.Y. 1997).

- Obtaining a credit report to determine the collectibility of a judgment (*Bakker v. McKinnon*, 152 F.3rd 1007, 8th Cir. 1998).
- Obtaining a credit report to impeach the plaintiff at deposition (*Duncan v. Handmaker*, 149 F.3rd 424, 6th Cir. 1998).
- Obtaining credit information for a divorced wife's use in child visitation litigation *(Bils v. Nixon, Hargrave, Devans & Doyle*, 880 P.2d 743, Ariz. App. Div. 2, 1994).

***Eavesdropping*:** Hardest of all to keep up with are federal and state laws concerning eavesdropping and tape recording. The Kentucky Penal Code has these provisions relevant to investigations in KRS Chapter 526, Eavesdropping and Related Offenses:

- KRS 526.010 Definition. The following definition applies in this chapter, unless the context otherwise requires: "Eavesdrop" means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device. (*But KBA ethics opinions require all party consent in civil matters – see below.*)

- KRS 526.020 Eavesdropping. (1) A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time. (2) Eavesdropping is a Class D felony.

- KRS 526.030 Installing eavesdropping device. (1) A person is guilty of installing an eavesdropping device when he intentionally installs or places such a device in any place with the knowledge that it is to be used for eavesdropping. (2) Installing an eavesdropping device is a Class D felony.

- KRS 526.060 Divulging illegally obtained information. (1) A person is guilty of divulging illegally obtained information when he knowingly uses or divulges information obtained through eavesdropping or tampering with private communications or learned in the course of employment with a communications common carrier engaged in transmitting the message. (2) Divulging illegally obtained information is a Class A misdemeanor.

Are the Methods of Investigation Ethical? — Lawyer as Investigator

Skill and Competence: Failure to comply with KRPC 1.1, Competence, in conducting an investigation can lead to both a bar complaint and a malpractice claim. Comment [5] to the Rule provides "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." Lack of competence can be reflected in the adequacy of the investigation, the validity of the lawyer's evaluation of facts gathered, and the advice given. Complaints by clients include that the lawyer failed to advance funds to hire investigators, talk to all necessary witnesses, and have the client examined by a doctor.[6] The following cases provide further insight on the adequacy of investigations:

- A Wisconsin lawyer was suspended for two months in part for an inadequate investigation in his representation of a client in a racial discrimination and sexual harassment case against a college. The client gave the lawyer plastic laminated documents purporting to be letters, memos, and e-mails she was sent by college personnel containing racially derogatory comments, apologies for sexual assaults, and threats. The college personnel asserted that the highly damaging documents were fabrications. The lawyer made no inquiry into the veracity of the documents notwithstanding their being suspicious on their face. At trial these documents were found to be obviously fraudulent. In the subsequent bar disciplinary case against the lawyer the hearing Referee cited Rule 1.1, Competence, Comment [5] and ruled "By making only a cursory and *pro forma* effort to validate the documents, after substantial doubt had been raised as to their authenticity, the Respondent shirked his duty of inquiry into an analysis of both the factual and legal ramifications of their continued use."[7] The Referee concluded that this was a matter of incompetence and that the lawyer was not as he claimed "merely a hapless victim of an unscrupulous client. It is the attorney's lack of preparation and inquiry that is a basis for the violation."[8]

- In an unusual case a Kentucky lawyer received a private reprimand for failing to recognize at the inception of an investigation the full implications of a conflict of interest in representing two persons. He was retained to investigate a shooting for the purpose of supporting the clients' assertion that they were not involved. He properly advised the clients of the potential conflict of interest and of the possibility he might have to withdraw, but did not advise that any and all information he obtained would be available to each of them. The investigation uncovered information indicating that one of the clients was directly involved in the shooting. The lawyer withdrew without revealing the information to either because he could not get the consent of both clients to do so. The clients then filed a bar complaint resulting in the lawyer's private reprimand for failing to fully communicate the significance of a joint representation including confidentiality considerations that could impact the clients individually.[9]

- Language in a Kentucky criminal case provides some balance to the question of what a reasonable investigation is and is offered here as equally applicable to a civil investigation. The defense counsel was accused of failing to conduct an adequate pretrial investigation. The Court reasoned "Trial counsel has a clear 'duty to make reasonable investigations or to make a reasonable decision that

makes a particular investigation unnecessary.' …. A reasonable investigation is not, however, the investigation that the best defense lawyer, blessed not only with unlimited time and resources, but also with the inestimable benefit of hindsight, would conduct."[10]

Deceptive Investigating: Pretexting, subterfuge, and secret tape recording may be useful investigation methods, but raise serious ethical issues for lawyers conducting an investigation. The key professional conduct rules are:

- *KRPC 8.3, Misconduct*.

  Paragraph (b) provides that it is misconduct to: "Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; …."

  Paragraph (c) provides that it is misconduct to: "Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; …." Note that there are no exceptions in Paragraph (c) thus seemingly forbidding any guile in pursuing an investigation.

- *KRPC 4.1, Truthfulness in Statements to Others*. The Rule provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." Note that this Rule has materiality as a qualifier, but KRPC 8.3 (c) does not.

- *KRPC 4.4, Respect for Rights of Third Persons*. This Rule provides in part: "In representing a client, a lawyer shall not … knowingly use methods of obtaining evidence that violate the legal rights of such a person." A primary application of this Rule concerns tape recording. Once again Kentucky lawyers face an anomaly. KRS 526.010 provides: "'Eavesdrop' means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto by means of any electronic, mechanical or other device." Conversely, KBA ethics opinions hold that, other than in criminal representations, lawyer recording of a conversation requires the consent of all parties. Upon inquiry lawyers may advise clients of their legal authority to record conversations, but must be careful not to do indirectly what they cannot do directly.[11] Read ethics opinions KBA E-279 (1984) and KBA-E 289 (1984) before giving any advice or instructions on tape recording.[12]

Another example of a violation of Rule 4.4 is requesting a credit report in violation of the FCRA.

***Interviewing Witnesses*.** In addition to the skill required in effective interviewing, lawyers must be keenly aware of the following KRPCs in deciding whom to interview and what to avoid when conducting an interview:

- *KRPC 4.2, Communication with Person Represented by Counsel*. Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

  Application of this Rule becomes complicated when investigating an organization or business entity with many constituents. Comment [2] addresses the entity context of the Rule:

  > In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent or an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

  In researching whether a member of an organization or business entity may be contacted begin with *Shoney's, Inc. v. Lewis*, 875 S.W. 2d 514 (Ky., 1994). This case covers much of how Rule 4.2 applies to the corporate setting. Also read the ABA Committee on Ethics and Professional Responsibility Formal Opinion 95-396, Communications With Represented Persons (1995). This opinion is a comprehensive analysis of Rule 4.2. covering many additional issues to those in *Shoney's*.

- *KRPC 4.3, Dealing with Unrepresented Person*. Rule 4.3 provides: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

- *KRPC 3.7, Lawyer as Witness*. Rule 3.7 provides that with few exceptions a lawyer cannot act as advocate at a trial in which the lawyer is likely to be a necessary witness. The problem this presents for the investigating

lawyer interviewing a witness is that, if impeaching the witness becomes an issue, the lawyer may become a necessary witness and thus disqualified to continue in an advocacy role. The recommended approach when it is foreseeable that it may become necessary to impeach a witness is to either have someone else conduct the interview or have someone else present when conducting the interview. If feasible, reduce the interview to a signed statement.[13]

Part I – Summing Up

The inconsistencies in the professional conduct rules and the tension between adhering to ethical conduct and providing the client with every advantage the law allows make the investigating lawyer's situation problematic to say the least. One authority in considering Rules 4.1, 4.3, and 8.3(c) summarizes the standard as "In sum, an attorney must identify himself and the interest he represents and must not engage in trickery or overreaching to obtain information or neutralize a potential witnesses (*footnotes omitted*)." Then goes on somewhat ambivalently to observe "The reality, however, is that some misrepresentation and overreaching are accepted and perhaps even required if one is to adequately represent a client. The rub is to define the boundary between the acceptable and the unacceptable."[14] It seems clear that at minimum lawyers in conducting an investigation should not break the law, lie, or misrepresent themselves.

Further consideration of the ethical limits on investigations is developed in Part II of this article. If you are interested in a more detailed analysis at this time, I recommend Douglas R. Richmond's article, Deceptive Lawyering, 74 U. of Cin. L. Rev. 577 (2005) available on the Internet.[15] ■

TO BE CONTINUED

ENDNOTES

1. *See*, Richmond, *Deceptive Lawyering,* 74 U. Cin. L. Rev. 577 (2005). Available on the Internet at http://www.law.uc.edu/lawreview/.
2. Cited information is a paraphrase of relevant material in ABA Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development – An Educational Continuum* (1992), page 138; and *The MacCrate Report — Building The Educational Continuum* (1994), page174, West Publishing Co.
3. SCR 3.130
4. http://www.ftc.gov/bcp/conline/pubs/credit/pretext.shtm.
5. *See generally*, Proof of a Claim Involving Alleged Violation of State Consumer Protection or Similar Statute Against Physician or Attorney, 79 Am. Jur. Proof of Facts 3d 199.
6. *See generally*, Mallen and Smith, *Legal Malpractice*, 2007 Ed., § 30.28.
7. Wisconsin's Rule 1.1 and Comment [5] are identical to Kentucky's.
8. *In Re Nunnery*, 725 N.W.2d 613 (Wis., 2007).
9. *An Unnamed Attorney v. Kentucky Bar Association*, 186 S.W.3d 741 (Ky., 2006).
10. *Baze v. Commonwealth*, 23 S.W.3d 619, 625 (Ky., 2000).
11. KRPC 1.2 (d), Scope of Representation, has this cautionary guidance when discussing questionable actions with a client: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
12. ABA Formal Opinion 01-422 (6/24/2001), Electronic Recordings by Lawyers Without the Knowledge of All Participants, is the latest consideration of this issue by the ABA Standing Committee on Ethics and Professional Responsibility. In the opinion the Committee withdrew a prior opinion that held that a lawyer ethically may not record any conversation by electronic means without the prior knowledge of all parties to the conversation.
13. For more guidance on this issue see Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed., 2002, §§ 4.5, the Attorney Investigator, and 5.7, Interviewing Witnesses.
14. Fortune, Underwood, Imwinkelreid, *Modern Litigation and Professional Responsibility Handbook*, 2d Ed. 2002, § 5.7, Interviewing Witnesses, p. 230.
15. http://www.law.uc.edu/lawreview/.