Compliance and Ethics in Investigations: Getting It Right

Ray V. Hartwell, III

A very aggressive independent investigation of suspected leaks by board members of a major corporation has been widely reported in recent months. The investigation involved the use by investigators of a practice referred to as "pretexting"—obtaining information through deception or false pretenses. The investigators, allegedly at the behest of senior executives and attorneys for the corporation, contacted telephone service providers and misrepresented their true identities in order to obtain board members' phone records.[1]

Public disclosure of the investigation resulted in extensive fallout, including the resignation of the chair of the board of directors and the general counsel, and fraud-related criminal charges brought by the California Attorney General's Office against the board chair, the company's director of ethics, and three individuals associated with the private investigation firms. The company has already paid $14.5 million to the California state attorney general to settle civil charges.[2] Executives, lawyers, and investigators—not to mention lawmakers—continue to grapple with the ramifications of the investigation.[3]

During the 1990s, investigative reporters for ABC News went "under cover" in order to seek a story on Food Lion's questionable food handling practices, including the repackaging and sale of spoiled meat. Food Lion did not contest the accuracy of the story, but instead attacked ABC's investigative techniques in a lawsuit alleging fraud and trespass. The falsification of employment applications and references by the ABC team—a "pretext" that enabled the reporting—became the focus in Food Lion's litigation against the network.[4]

And, in the antitrust world, the use of covert eavesdropping by the DOJ was at the heart of one of the first major international cartel cases.[5] The Department of Justice's "lysine video" has since become a staple of compliance programs and seminars on contemporary criminal antitrust enforcement.

Lawyers often supervise investigations in a variety of circumstances, including suspected misconduct by corporate agents or employees, gathering evidence to prepare for litigation, or to supplement pretrial discovery when litigation is pending. Prosecutors may also supervise agents or use informants to elicit (and secretly record) admissions from suspects. In the antitrust context,

■

Ray V. Hartwell, III *is a partner at Hunton & Williams LLP, Washington, D.C. His practice includes the conduct of internal and independent investigations, and at times the supervision of private investigators assisting in such investigations.* *Djordje Petkoski's assistance in the preparation of this article is gratefully acknowledged.*

[1] *See* Peter Waldman & Don Clark, *California Charges Dunn, 4 Others in H-P Scandal*, WALL ST. J., Oct. 5, 2006, at A1.

[2] *See* Christopher Lawton, *H-P Settles Civil Charges in "Pretexting" Scandal*, WALL ST. J., Dec. 8, 2006 at A3.

[3] *See, e.g.*, Christopher Conkey & David Rogers, *Congress May Soon Make "Pretexting" a Federal Crime*, WALL ST. J., Dec. 6, 2006 at B1.

[4] *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

[5] *See* Scott D. Hammond, From Hollywood to Hong Kong—Current Antitrust Enforcement Is Coming to a City Near You, Speech of Nov. 9, 2001, *available at* http://www.usdoj.gov/atr/public/speeches/9891.htm.

lawyers may assist in client investigations of suspected price-fixing activities, compliance with rules against transshipment, deceptive or exclusionary practices, or other competition-related conduct.

In all of these investigations, it can be useful for the investigators, agents, or informants to misrepresent their true identities or purposes. The conduct of any investigation will raise a host of compliance and ethics issues, but the risk of running afoul of ethics rules is heightened by the use of pretexting. Both counsel and clients may be exposed to a range of charges, including witness intimidation, retaliation, or even, as the recent cases indicate, criminal fraud or conspiracy.

Whatever one may think of the practices reported in the press of late, deception has been used successfully, and most would say appropriately, in a number of familiar investigation scenarios. Most of us probably do not consider it shocking, for example, that minority couples have posed as prospective home purchasers in order to gather evidence in housing discrimination cases. We are more grateful than aggrieved when law enforcement agents conduct sting operations that net drug dealers and corrupt politicians. And we understand the need for various types of entrapment strategies in a range of cases, from intellectual property misappropriation and infringement to child pornography.

The conduct of any investigation will raise a host of compliance and ethics issues, but the risk of running afoul of ethics rules is heightened by the use of pretexting.

As lawyers guiding or assisting our clients and their investigators, we need to recognize what separates permissible from impermissible investigative techniques.[6] The starting point, and the focus here, is the ethical rules within which counsel must operate when supervising investigations. Of course, counsel must not only consider the ethics rules and legal framework, but also must be guided by common sense and a healthy wariness about techniques that might fail a "smell test." Otherwise, the risk that a furor over the investigation itself will get in the way of achieving the inquiry's proper objectives will be all too real.

Key Disciplinary and Ethics Rules to Consider in Planning an Investigation

The ethics rules, including the disciplinary ABA Model Rules of Professional Conduct, do not answer all of the questions that may arise in the course of an investigation. Nonethess, the Model Rules set forth below are instructive and should be considered in planning an investigation.[7]

- Model Rule 8.4(c) states that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Although this provision and others literally would preclude all pretexting, interpretations of the rules do allow pretexting in some circumstances.
- Model Rule 4.1(a) provides that, "[i]n the course of representing a client, a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."
- Model Rule 4.4(a) prohibits using "methods of obtaining evidence that violate the legal rights" of third parties.
- Model Rule 4.2 states that, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

[6] As general references on the subject, see David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Eth. 791 (2001); David C. Hricik, *Conflicts and Confidentiality: The Ethical and Procedural Issues Concerning Experts* (2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917164.

[7] While the Model Rules (*available at* http://www.abanet.org/cpr/mrpc) have been adopted by most states, interpretations of the rules can vary among the states. Moreover, some states have adopted the Model Rules with modifications, while others, such as New York and California, have not adopted them at all. Even these states, however, have similar restrictions.

lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The drafters were aware that this is potentially complicated in the case of organizational clients, and the commentary to the rule addresses this subject by prohibiting contact with managerial employees of a corporate party or any employee who may legally bind the corporation with respect to the matter in question.[8]

- Model Rule 4.3(a) provides that when a lawyer deals with a person who is not represented by counsel, and "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."
- With respect to investigators dealing with persons who are not represented by counsel, there is some leeway not to explain the purpose of an inquiry so long as the investigator does not purport to be acting as, or on behalf of, a lawyer. This is so because Rule 4.3 turns upon the presumed expectations of the third party in dealing with a lawyer, as opposed to nonlawyers.
- Model Rule 5.3(b) states that "a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."
- Model Rule 5.3(c)(1) provides that a lawyer is responsible for a nonlawyer's conduct that violates the rules if the lawyer "orders or, with the knowledge of the specific conduct, ratifies the conduct involved."
- Model Rule 8.4(a) adds that it is misconduct for a lawyer to "violate or attempt to violate the Rules . . . , knowingly assist or induce another to do so, or do so through the acts of another."
- If a lawyer is asked by a judge about the investigative tactics employed to obtain particular information or evidence, Model Rule 3.3 prohibits false statements of law or fact to a tribunal.

This is a lot to digest, and there is more.

While navigating safely through the applicable ethical and legal rules may avoid sanctions or prosecution, it will assure neither the admissibility of evidence gathered in the course of an investigation nor the reaction of a court or jury . . .

Other Legal and Practical Considerations

The foregoing ethical rules are not the only constraints that may affect the planning of an investigation. As the matters mentioned above underscore, federal and state criminal statutes may be invoked at the discretion of prosecutors.[9] While navigating safely through the applicable ethical and legal rules may avoid sanctions or prosecution, it will assure neither the admissibility of evidence gathered in the course of an investigation nor the reaction of a court or jury—either of which could react negatively to aggressive techniques.

Both the rules and a sense of personal integrity favor honest disclosure of a person's identity, interest, and role in the course of an investigation whenever possible. However, since disclosure could render the achievement of some legitimate investigative objectives difficult, if not impossible, there is a place for pretext. This has been recognized in ethics opinions and cases to varying degrees in different jurisdictions, with the result that not all pretexting is out of bounds.

---

[8] *See* Comment 7 to Model Rule 4.2 ("In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.").

[9] Federal legislation that would complement existing sanctions is also under consideration, and the *Wall Street Journal* reported recently that "[a]bout 12 states have made telephone pretexting a crime." *See* Conkey & Rogers, *supra* note 3.

General Guidance

Ethics opinions and cases provide some general guidance on the legality and ethical propriety of pretexting. The opinions and cases suggest that pretexting is most likely to result in an ethics or statutory violation when used to obtain information legally protected from disclosure, such as financial or telephone records, or information associated with strong privacy interests. For example, the Eighth Circuit recently found that a plaintiff's attorney violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., by obtaining a potentially adverse party's credit reports in order to determine whether the party was judgment proof.[10]

In addition to the Fair Credit Reporting Act, myriad federal and state statutes may attach civil or criminal liability to pretexting used to obtain non-public information like financial and phone records. According to the Federal Trade Commission, for example, the Gramm-Leach-Bliley Act, 15 U.S.C. § 6821 et seq., makes illegal the use of "false, fictitious or fraudulent statements or documents to get customer information from a financial institution or directly from a customer of a financial institution."[11] The Federal Trade Commission further maintains that the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., generally prohibits pretexting designed to obtain sensitive consumer information. The Commission has filed several complaints alleging that pretexting used to obtain sensitive consumer information violates the Gramm-Leach-Bliley and Federal Trade Commission Acts.[12] The complaints have generally resulted in settlements enjoining the allegedly improper use of pretexting.

The federal wire fraud statute, 18 U.S.C. § 1343, may also be used to prosecute some forms of pretexting, even though it has not yet been applied in the pretexting context. That statute provides criminal penalties for the use of wire communications in interstate commerce to engage in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent practices."

In addition to federal statutes, state criminal laws may be used to prosecute pretexting under certain circumstances. As noted earlier, prosecutors in California recently filed charges under that state's criminal laws in connection with the heavily publicized company investigation of suspected leaks by board members. The prosecutors filed charges against the company executives and investigators who ordered or used pretexting to obtain the board members' personal telephone records. They alleged violations of several provisions of the California Penal Code, including Section 530.5, which prohibits the use of personal identifying information of another to obtain credit, goods, or services in another's name.

Where neither the techniques used, nor the data obtained, are specifically regulated by statute, authorities become scant, but two general propositions can be drawn from existing court opinions: (1) courts are likely to find that pretexting violates the ethics rules when it is used to intimidate or trick an adverse party or witness into making admissions or statements which that party would not make under normal circumstances, but (2) courts are unlikely to find an ethics or legal violation when pretexting is used to obtain information that is objective or generally shared with the public.

---

[10] Bakker v. McKinnon, 152 F.3d 1007 (8th Cir. 1998).

[11] FTC Facts for Consumers, Pretexting: Your Personal Information Revealed, *available at* http://www.ftc.gov/bcp/conline/pubs/credit/pretext.pdf.

[12] *See, e.g.*, Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission v. Guzzetta, No. CV-01-2335 (E.D.N.Y.), *available at* http://www.ftc.gov/os/2001/04/pretextingsmartdatacomplaint.pdf.

Pretexting Designed to Elicit Admissions. Several courts have condemned the use of pretexting to steer or trick adverse parties or potential witnesses into making damaging admissions. In *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,[13] for example, the Eighth Circuit found that the use of pretexting designed to elicit damaging admissions from an opposing party violated South Dakota's versions of Model Rules 4.2 (prohibiting communications with represented parties absent consent), 4.3 (prohibiting statement or implication of "disinterest"), and 8.4 (prohibiting deceitful conduct).

In *Midwest Motor*, defense counsel instructed an investigator to pose as a customer at the plaintiff's store and attempt to elicit and record "specific" and "damaging" admissions. The admissions were meant to support defendant's theory that the plaintiff was not injured by its inability to sell the defendant's product. Several admissions sought by defense counsel were recorded in the investigator's notes of meetings with counsel predating the investigator's visit to the plaintiff's store. These admissions included inducing plaintiff's store staff to "admit" that products competing with defendant are "the best" and "bad mouth[ing]" another plaintiff.

The court rejected the defense counsel's justification for its conduct, namely that the pretexting investigation was conducted so that defense counsel could become familiar with the plaintiff's product line. The court found that the investigation was designed to "elicit damaging admissions . . . to secure an advantage at trial" and as such could not be countenanced under the rules of professional conduct. The court also stressed that "the obligations and duties of lawyers in our society demand conduct of the highest moral character."[14]

In another case, *Allen v. International Truck and Engine*,[15] a federal district court found that a corporate defendant's attorneys violated Model Rules 4.2, 4.3, 5.3, and 8.4 by directing investigators to pose as employees and question other employees "specifically about the lawsuit" between their client and its employees. The court stressed that "lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not say or do."[16]

Pretexting Designed to Collect Objective Information. *Midwest Motor* and *Allen* stand in stark contrast to cases upholding the use of pretexting to obtain objective information in the absence of questioning or other techniques designed to manufacture or encourage admissions. In *Apple Corps Ltd. v. International Collectors Society*,[17] for example, a federal district court found that the plaintiffs' use of pretexting in a copyright and trademark infringement suit did not violate New Jersey Rules of Professional Conduct 4.2 (prohibiting contact with represented parties absent consent), 4.3 (requiring disclosure to unrepresented parties), and 8.4(c) (prohibiting deceitful conduct).

The *Apple* plaintiffs owned trademarks and copyrights relating to images of the Beatles and had entered into a consent order with the defendants limiting the defendants' ability to sell certain stamps bearing images of the Beatles. In order to test the defendants' compliance with the consent order, the plaintiffs' attorneys (including investigators and staff) called the defendants' sales agents, posing as customers interested in purchasing stamps covered by the protective

---

[13] 347 F.3d 693 (8th Cir. 2003).

[14] *Id.* at 699–701.

[15] 2006 U.S. Dist. LEXIS 63720 (S.D. Ind. 2006).

[16] *Id.* at * 20. *See also In re Ositis*, 333 Or. 366 (2002) (reprimanding attorney for engaging private investigator to pose as journalist in order to obtain information from potential adversary).

[17] 15 F. Supp. 2d 456 (D.N.J. 1998).

order. In many of the plaintiffs' calls, the defendants' sales agents sold stamps in violation of the protective order.

Importantly, the questioning employed by the *Apple* plaintiffs was limited to simple requests to purchase the stamps at issue and did not involve any attempts to trick or intimidate the defendants' sales agents into making admissions or other damaging statements. The court found that "[t]he sales representatives' communications with Plaintiffs' counsel and investigators were limited to recommending which stamps to purchase and accepting an order for [the stamps]. The investigators did not ask any *substantive questions* other than whether they could order the [stamps]."[18]

In finding that the plaintiffs did not violate the ethics rules, the court stressed that the plaintiffs' use of pretexting was not designed to intimidate, or take advantage of, the defendants' sales representatives. The court found that the "Defendants have not produced a scintilla of evidence demonstrating that Plaintiffs' investigators intimidated [defendants'] sales representatives into selling them [the Beatles stamps] or provoked Defendants' breach of the Consent Order."[19] The court also stressed that "Like [Rule] 4.2, [Rule] 4.3 was intended to prevent a lawyer who fails to disclose his role in a matter from taking advantage of an unrepresented party."[20]

A comparison of the cases suggests that courts recognize the value that pretexting can serve in investigating wrongful conduct.

The *Apple* decision was echoed by another district court, which upheld the plaintiffs' use of an investigator posing as a customer to detect trademark infringement. In *Gidatex v. Campaniello Imports, Ltd.*,[21] the plaintiffs hired investigators to pose as interior designers and visit the defendants' furniture showroom and warehouse to inquire about the availability of infringing merchandise. The court found that the plaintiffs did not violate New York's analogues to Rules 4.2 and 8.4(c).

Considering the rule against contacting a represented person, the court found that the conduct at issue "technically satisfies" the rules but concluded that the "actions simply do not represent the type of conduct prohibited by the rules." The court concluded that the Gidatex 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 [defendant's] showroom and warehouse."[22]

Considering the rule against attorney/investigator "misrepresentations," the court stated that "[t]he policy interests behind forbidding misrepresentations by attorneys are to protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by their own attorneys."[23] Again, the court found no evidence that the investigators caused the sales clerks to make statements they otherwise would not have made to a customer.

Courts Appear Willing to Allow Some (Beneficial) Use of Pretexting. A comparison of the *Apple* and *Gidatex* cases with the *Midwest Motor* and *Allen* cases suggests that courts recognize the value that pretexting can serve in investigating wrongful conduct. *Midwest Motor* and *Allen* involve the use of pretexting in conjunction with lines of questioning designed to steer or trick potentially adverse parties or witnesses into making specific admissions or other damaging state-

---

[18] *Id.* at 474 (emphasis added).

[19] *Id.* at 472.

[20] *Id.* at 476.

[21] 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

[22] *Id.* at 125–26.

[23] *Id.* at 122.

ments. Statements and information elicited under such circumstances are likely to be of questionable veracity, since they are clouded by the questioning and actions that elicited them. As such, the statements have limited value in furthering the courts' truth seeking function.[24]

On the other hand, the pretexting used in the *Apple* and *Gidatex* cases did not create the danger of improperly eliciting admissions of limited veracity. Instead, both *Apple* and *Gidatex* considered the use of pretexting to obtain information without loaded questions or other trickery, which resulted in objective information useful in uncovering wrongdoing and promoting the courts' truth-seeking function. As such, both *Apple* and *Gidatex* stressed the important role of pretexting in uncovering objective evidence of wrongdoing. The *Apple* court, for example, stressed the "prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means."[25]

Exclusion of Evidence

As the above discussion illustrates, truth-seeking plays a prominent role in the courts' analysis of the legality and ethical propriety of pretexting investigations. The courts' concern for truth-seeking also plays an important role in the courts' determination of the appropriate sanctions for improper uses of pretexting, such as pretexting designed to elicit admissions unfairly. As a result, courts may punish improper uses of pretexting by excluding evidence. For example, the court in *Midwest Motor* excluded from the evidence the tape recordings made during the pretexting investigation as well as all additional evidence obtained as fruits of the recordings.

The availability of the exclusion sanction can serve as a strong deterrent to attorneys considering the use of pretexting in investigations because it carries the prospect of wholly eliminating the fruits of the investigation. Attorneys should be particularly wary of using pretexting when other avenues for gathering information exist, including formal discovery. For example, in the modern business environment, much of what one might seek through pretexting is recorded in discoverable video and audio surveillance tapes that are made and—at least for a time—retained in the ordinary course of business.

A Prescription for "Getting It Right"

While the cases discussed above shed helpful light on likely court interpretations of the relevant legal and ethics rules, their value in guiding the use of pretexting is limited, for a number of reasons. First, the cases lack precedential value outside of their respective jurisdictions and can easily be distinguished by subsequent courts because each inquiry into the legality or propriety of pretexting greatly hinges on very specific facts. Moreover, the cases provide little guidance on the various non-legal but very real ramifications of pretexting. Under the appropriate circumstances, pretexting investigations can result in negative publicity. Negative publicity can result in a battered corporate image, corrective advertising expenditures, and lost customers and sales.

In these circumstances, counsel supervising investigations can serve their clients (and themselves) well by considering carefully, in planning any investigation, the objectives and possible

---

[24] Similarly, entrapment has limited value in identifying criminal conduct, which would not occur but for the act of entrapment, and is also a prohibited investigative technique.

[25] 15 F. Supp. 2d at 475.

ramifications of the investigation. At the outset there should be candid and careful weighing of the range of means to be employed, the fundamental fairness of the means (both when considered alongside the conduct under investigation, and generally), and the feasibility of an incremental approach that employs less invasive measures, at least initially. Simply because one has the capability to use a given technique does not mean that it is a good idea.

Counsel's checklist of considerations should certainly include the following:

- *The ethical rules, and opinions and cases interpreting them, in each state or other jurisdiction where the investigation might come under scrutiny.* Is the conduct being investigated within a jurisdiction where pretexting or similar techniques have been approved or at least tolerated in past cases?
- *In each relevant jurisdiction, the laws and regulations that may be implicated by the contemplated investigative techniques.* Legal research is vital on federal and state laws on identity theft, invasion of privacy, tape recordings and other forms of surveillance, and similar topics. Counsel must consider not only the law, but also the enforcement climate, and the likely reaction of those being investigated.
- *Planned use of the fruits of the investigation, and the impact investigative techniques may have on that use.* For example, will the manner in which information is obtained jeopardize the admissibility of evidence and potentially provide adversaries a means of "muddying the water"?
- *The potential impact of, and planned response to, public disclosure of the investigation.* Will the process you and your client followed in deciding to utilize the means employed stand up to public scrutiny? Does the value of success in the investigation justify the risk to the client that could flow from disclosure?

Simply because one has the capability to use a given technique does not mean that it is a good idea.

Conclusion

Investigations involving pretexting can arise in a number of industries and contexts. Investigation of possible antitrust violations, which may involve secret, conspiratorial communications, is an area where pretexting may potentially serve a valuable function. However, improper use of pretexting can result in significant costs. The planning and supervision of such sensitive investigations is an undertaking in which common sense and sound judgment are essential. And they, in turn, must be strengthened by a solid understanding of the applicable ethical rules, statutes and regulations, and opinions and cases interpreting them. ●