# ACC AMERICA GREATER NEW YORK CHAPTER
# 2007 ETHICS MARATHON

# LESSONS LEARNED FROM HEWLETT PACKARD – HOW TO CONDUCT INVESTIGATIONS

Bruce R. Millman*
Littler Mendelson, P.C.
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## I. WHO IS YOUR CLIENT?

A. DR 5-109 (a):

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

B. "The formation of an attorney-client relationship 'hinges upon the client's [reasonable] belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'" *The Diversified Group, Inc. v. Daugerdas*, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001), quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978).

C. DR 4-101(b) prohibits disclosing a client's confidence or secret, or using a client's confidence or secret for the advantage of another.

D. DR 7-104 (a) (2) prohibits a lawyer from "'giv[ing] advice to a party who is not represented by a lawyer, other than advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

E. DR 7-104 (a) (1) prohibits a lawyer from "communicating or causing another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter," without the other lawyer's prior consent. Note that the no-contact rule can only be waived by the person's attorney and not by the individual himself. ABA Formal Opinion 95-296 (1995).

II. PRESERVING PRIVILEGE

A. Privilege attaches to communications by corporate employees to a corporate attorney made at the direction of their superiors for the purpose of the corporation obtaining legal advice. *Upjohn Company v. U.S.*, 449 U.S. 383 (1981).

B. Employees interviewed in internal investigation could not assert privilege to prevent disclosure to grand jury of documents relating to investigation, where they had no reasonable basis to believe that the corporate attorneys were representing them. *In re Grand Jury Subpoena: Under Seal,* 415 F.3d 333 (4th Cir. 2005).

1. Note that the *Upjohn* privilege is the corporation's not the employee's.

2. Note that court found the employees had no reasonable basis to believe they were represented by corporate counsel, even though, *inter alia*, counsel had told the employees prior to the interview that they could represent the employees as long as no conflict appears.

3. Query what if an attorney-client relationship *had* been formed and the corporation alone wished to waive the privilege and disclose its investigation or report to an investigating government agency?

C. McNulty Memo (Memo released 12/12/06 by U.S. Deputy Attorney General Paul J. McNulty changing corporate charging guidelines for federal prosecutors across the country). Specifically, the memo dealt with what federal prosecutors must show before they can request corporations to waive their attorney client privilege and work product protections:

1. Nature and seriousness of the offense including the risk of public harm

2. Pervasiveness of the misconduct by the company

3. Company's history of similar conduct, prior offenses

4. Corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate

5. Evidence of pre-existing compliance program

6. Company's remedial action: Did the company conduct a thorough and independent investigation; replace, discipline or terminate the responsible employee; pay restitution; voluntarily cooperate with government investigator, etc.

7. Collateral damage of a prosecution, impact on shareholder, retirees and other innocent employees

8. adequacy of the prosecution of individuals responsible for the corporation's malfeasance;

9. Adequacy of non-criminal remedies

III. PRETEXTING

A. Pretexting is obtaining certain forms of information under false pretenses. Whether it is legal or ethical may depend on the type of data sought, the person seeking the information, and the reason the information is sought.

B. Examples of situations where pretexting has been used to obtain information:

1. Disability claims

2. Collection cases/background checks

3. Investigative/celebrity reporting

4. "Non-compete" investigations

5. To find witnesses, research alibis

6. Finance/accounting fraud allegations

7. Investigating falsification of records

8. Trademark and fair trade disputes

C. Statutes Implicated:

1. Telephone Records and Privacy Protection Act of 2006

2. Gramm-Leach-Bliley Financial Services Modernization Act

3. Wire fraud statutes

4. Federal Trade Commission Act/Telecommunications Act of 1996

5. The Computer Fraud and Abuse Act

6. State identity theft laws

7. State restrictions on access to phone records

8. Common law fraud

D. Statutes in More Detail:

1. Telephone Records and Privacy Protection Act of 2006

a. Prohibits obtaining confidential phone records information by making false or fraudulent statements or using false or fraudulent documents, or accessing customer accounts through the internet without authorization. The statute also prohibits sale or transfer of confidential phone records, purchase or receipt of confidential phone records.

2. Gramm-Leach-Bliley Financial Services Modernization Act, 15 USC § 6821(a)

a. Prohibits obtaining, attempting to obtain, or causing someone to disclose customer information of a financial institution by making a false, fictitious, or fraudulent statement or representation to an officer, employee, or agent of a financial institution, a customer of a financial institution; or

b. Providing any document to an officer, employee, or agent of a financial institution, knowing that the document

(i) is forged, counterfeit, lost, or stolen,

(ii) was fraudulently obtained,

(iii) or contains a false, fictitious, or fraudulent statement or representation.

c. It is also illegal to request a person to obtain customer information of a financial institution, knowing that the person will obtain, or attempt to obtain, the information from the institution in any manner described in above.

d. Criminal penalty for knowing violations– 15 USC § 6823

e. EXCEPTIONS:

(i) law enforcement obtaining information

(ii) testing of systems

(iii) investigations into employee misconduct

E. FTC's Role in Monitoring Pretexting

1. Section 5 of the FTC Act:

a. Prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"

b. Deception: a material misrepresentation that is likely to mislead a reasonable consumer to their detriment

c. Unfairness: an act or practice that causes harm to consumers, which the consumer cannot reasonably avoid, and which does not provide countervailing benefits to consumers or competition

F. Legal Ethics of Pretexting:[1]

1. DR 1-102 (a)(2): "A lawyer or law firm shall not . . . circumvent a disciplinary rule through actions of another."

2. DR 1-102 (a)(4): "A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

3. DR 1-102 (a)(3): "A lawyer or law firm shall not . . . engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

4. DR 1-102 (a)(5): prohibits a lawyer from engaging "in conduct that is prejudicial to the administration of justice."

5. DR 1-104 (d): Where non-lawyers retained by a lawyer engage in conduct that would violate the disciplinary rules, the lawyer is responsible if the lawyer ordered, directed or ratified the specific conduct, or if the lawyer had supervision of the non-lawyer and in the exercise of reasonable supervision should have known of the conduct so that it could have been avoided or remedial or mitigating action could have been taken.

[1] DR 1-102 (a) cited below implicates conduct either than pretexting that the panel may discuss, such as wiretapping.

6. DR 7-102 (a)(7): "In the representation of a client, a lawyer shall not . . . counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent."

7. DR 7-102 (a)(7): "In the representation of a client, a lawyer shall not . . . knowingly make a false statement of law or fact."

8. Several cases indicate that the rule prohibiting attorney misrepresentations is not or should not be strictly applied. *See, e.g., Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 122 (S.D.N.Y. 1999).

"As for DR 1-102 (a)(4)'s prohibition against attorney misrepresentations, hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation. The 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." * * *

"These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general."

*See also, Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005) ("The prevailing understanding in the legal profession is that 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."); *Apple Corps. Ltd. v. International Collectors Soc.*, 15 F.Supp 2d 456, 475 (D.N.J. 1999) ("misrepresentations solely as to identity or purpose and solely for evidence gathering purposes" are not prohibited.)

9. On the other hand there are many cases that apply the rule strictly, even where it might be argued that a greater "societal good" is derived from its violation. *Matter of Pautler*, 47 P.3d 1175 (Col. 2002) (Deputy district attorney disciplined for posing as a public defender to get murderer – later convicted and sentenced to death – whose whereabouts were unknown but who had confessed to three murders and threatened to kill again, to surrender.); *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (Evidence excluded due to violations of various ethical rules, court

suggesting in dicta that employing investigators to pose as customers also violate ethical rules.)

10. Opinion 737, New York County Committee on Professional Ethics, May 23, 2007:

Non-government attorneys may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances where: (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code (including, but not limited to, DR 7-104, the "no-contact" rule) or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. Moreover, the investigator must be instructed not to elicit information protected by the attorney-client privilege.

G. Pretexting and Represented Persons

1. Who is considered a "represented" person?

a. In NY, a represented corporation includes employees "whose acts or omissions in the matter under inquiry are binding on the corporation or are imputed to the corporation for purposes of its liability or employees implementing the advice of counsel." *Niesig v. Team I*, 76 N.Y.2d 363, 374 (1990).

b. Lawyer cannot allow a pretexting investigator to contact someone who might be "represented." *Allen v. Intl Truck and Engine*, 2006 U.S. Dist. LEXIS 63720 (S.D. In. 2006); *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147 (D. S.D. 2001). *But see Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (use of investigators posing as consumers, speaking to nominal parties who are not involved in any aspect of the litigation does not violate "no contact" rule); *Apple Corps. Ltd. v. International Collectors Soc.*, 15 F.Supp 2d 456, 475 (D.N.J. 1999) (lawyers and investigators acting as members of the general public to engage in ordinary business transactions with low level employees of represented corporation does not violate "no contact" rule).

## IV. TELEPHONE MONITORING OR TAPING OF CONVERSATIONS

A. Framework of State and Federal Laws: "One consent" and "two consent" statutes.

1. Electronic Communication Privacy Act, 18 U.S.C. § 2511(2)(d): Unlawful to intercept a wire or electronic communication without consent of at least one party to the conversation.

2. Stored Communications Act

a. Prohibits unauthorized access to stored wire and electronic communications.

b. Defenses:

(i) Consent of the system provider

(ii) Consent of the system user

3. Compare, NY Penal Law § 250.00. Contrast, Cal. Penal Code § 632, requiring consent of all parties to the recording of a phone conversation.

4. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006) (Salomon Smith Barney violated California wiretap laws by undisclosed tape recording in Georgia of California customer calls.)

B. Ethical Considerations Are Evolving

1. ABA Formal Opinion 337 (1974): Lawyer's undisclosed taping of conversation unethical.

2. ABA Formal Opinion 01-422 (2001): Taping of conversations is not unethical if not unlawful in the relevant jurisdiction and if there is no false representation that the conversation is not being taped.

3. New York County Opinion 696 (1993): "A lawyer may secretly record telephone conversations with third parties, including other lawyers, provided one party to the conversation has consented and provided that such recording does not violate any applicable law or a specific ethical rule.

4. New York City Opinion 2003-02 (2003):

This Committee remains of the view, first expressed in NY City 1980-95 that undisclosed taping smacks of trickery and is improper

as a routine practice. At the same time, however, we recognize that there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good. We further recognize that it would be difficult, if not impossible, to anticipate and catalog all such circumstances, and that a lawyer should not be subject to professional discipline if he or she has a reasonable basis for believing such circumstances exist.

* * *

If, however, the only reasons for taping are convenience and increased accuracy, there is no reason to refrain from disclosing that the conversation is being taped. Nor is it correct that undisclosed taping has no effect other than providing an accurate record of what was said. As attorneys are well aware, individuals tend to choose their words with greater care and precision when a verbatim record is being made and some individuals may not wish to speak at all under such circumstances. Undisclosed taping deprives an individual of the ability to make those choices. Undisclosed taping also confers upon the party making the tape the unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not. In addition, because undisclosed taping has those effects, it therefore also has the potential effect of undermining public confidence in the integrity of the legal profession . . . .

5. Practice may remain unethical in some states.

## V. USE OF PRIVATE INVESTIGATORS

1. *Burns v. Masterbrand Cabinets, Inc.*, 2007 WL 80853 (Ill. App. Jan. 9, 2007)

Workers compensation carrier hired private investigator to spy on employee with back condition. Investigator used false pretenses to enter employee's home and videotape him. The court reversed the previous court's order granting defendants' motion to dismiss, leaving open the possibility of vicarious liability for the tort of intrusion upon seclusion.

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