



EXTERNAL INVESTIGATIONS: WHEN IS IT OKAY TO PRETEND?

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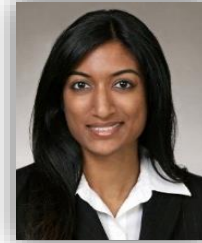
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Pretexting

- **Pretexting**
 - Disguised identity
 - Disguised purpose
- **Permissible in civil litigation?**

Types of Pretexting Investigations

Examples:

- Trademark matters
 - Whether a suspected infringer is selling a product
 - How a suspected infringer is representing itself to callers and visitors
- Trade secret and non-compete matters
 - Whether a suspected misappropriator is working for a competitor
 - What role that person is playing
- Patent matters
 - What product a potential infringer is making or planning

Types of Pretexting Investigations

- False advertising matters
 - What claims a potential false advertiser is making when speaking to customers
- Copyright matters
 - Whether a potential infringer is making samples available or selling the product
- Discrimination matters
 - Whether business is engaging in unlawful discrimination
- Commercial of litigation of any type
 - Whether personal jurisdiction exists
 - Background information on opposing party and/or counsel
 - Facts for lawsuit

Is Pretexting Permissible?

- Some pretexting is condoned by some courts
 - Law differs from state to state
 - In some situations, pretexting is permissible and even expected
- Know the relevant rules and case law before deciding whether to pretext

Ethical Rules

Sources of ethical rules, decisions and opinions

- ABA Model Rules
- State Rules of Professional Conduct
- Court decisions
 - Binding
 - Advisory
- Bar Association opinions
 - State
 - Local
 - Philadelphia Bar Association

Ethical Rules

- Bar association opinions are advisory only
 - Not binding on
 - Disciplinary Board of the Supreme Court of PA; or
 - Supreme Court of PA
 - “Carry only such weight as an appropriate reviewing authority may choose to give it”

Laws That May Be Implicated

Examples of potentially applicable laws

- Common law
 - Invasion of privacy
 - Fraud
- Federal and state laws
 - Wire fraud, wiretapping laws
 - Laws barring wrongful use of computer data
 - Identity theft statutes
 - Private investigator licensing laws
 - Privacy laws
 - Graham Leach Bliley
 - protect customers' private information
 - Law barring pretexting for phone records

Hewlett Packard pretexting

- HP Board Chair in 2006 conducts investigation of board members and journalists
 - to identify source of leak
- GC hires private investigators
 - Investigators impersonate board members and journalists to obtain their phone records
 - Director of Ethics/Senior Counsel supervises investigation
 - He and GC advise that this pretexting is legal
- Key players at HP resign
 - Board Chair
 - GC
 - Director of Ethics/Senior Counsel
 - Manager of global investigations

Hewlett Packard pretexting

- CA AG files civil and criminal charges
 - Board Chair, Director of Ethics and investigators charged with felonies
 - HP settles civil charges
 - pays \$14.5 million to settle civil charges
 - \$13.5 million of it is for Privacy and Piracy Fund
 - agrees to corporate governance reforms
 - agrees to inform independent directors -- and, for 5 years, the CA AG -- of possible privacy violations
- GC testifies before Congress and takes the Fifth
- FTC files civil lawsuit

ABA Model Rules

ABA Model Rule 4.1. **Truthfulness in Statements to Others**

[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third party. . .

ABA Model Rule 4.2. **Communication with Person Represented by Counsel**

A lawyer shall not communicate about the subject matter of a representation with a person who 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 to do so by law or a court order.

ABA Model Rules

ABA Model Rule 4.3. **Dealing with Unrepresented Person**

[A] lawyer shall not state or imply that the lawyer is disinterested.

ABA Model Rule 8.4. **Misconduct, Direct or Indirect**

It is professional misconduct for a lawyer to:

- violate or attempt to violate Rules of Professional Conduct, knowingly assist another to do so, **or do so through the acts of another**;
- engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...

ABA Model Rules

ABA Model Rule 5.3:

A lawyer is responsible for another person's violation through involvement, knowledge, or supervisory authority if the lawyer

- orders,
- directs, or
- ratifies the conduct.

ABA Model Rule 8.4(a):

A lawyer cannot circumvent ethical prohibitions through acts of another

PA and NJ as compared to Model Rules

- PA and NJ Rules of Professional Conduct
 - Substantially similar or identical to those particular ABA Model Rules for our current analysis, **except** regarding “represented parties”
 - ABA and PA view “represented party” as a constituent of the organization...
 - who supervises, directs or regularly consults with the organization’s lawyer concerning the matter
 - who may legally bind the organization regarding the matter
 - whose act or omission in connection with the matter may be imputed to the organization
 - NJ follows “litigation control group” test in its Rule 4.2 (Communication with Person Represented by Counsel)
 - Employee in the litigation control group is a “represented party”

N.J. on “litigation control group”

- Litigation control group includes current agents and employees who are
 - responsible for,
 - or significantly involved in,
 - the determination of the organization's legal position in the matter, whether or not in litigation
- “Significant involvement” requires more than just supplying factual information or data

Pennsylvania: Ethics Opinions

MySpace/Facebook friend request

Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (March 2009):

- May a lawyer have a third party send a MySpace/Facebook friend request to a witness without disclosing that the purpose is to obtain information for impeachment in a lawsuit?
 - No. Violates Rule 8.4 (“Misconduct”):
 - It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Pennsylvania: Ethics Opinions

Accessing Social Networking Site

PA Bar Association, Formal Opinion 2014-300 (2014):

- Attorneys may not use a pretextual basis for viewing otherwise private information on social media
- OK to request access to private information of unrepresented person if disclose identity and purpose
- OK to access public portions of social networking site of represented or unrepresented person
 - Similar to any other public statements

Trademark cases

Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998)

- Owners of the Beatles trademarks and Yoko Ono sued a stamp producer
 - Sought to enjoin unauthorized reproductions of Beatles likenesses on stamps
 - Obtained consent injunction
- But Plaintiffs believed that Defendant continued to sell the stamps, in violation of the injunction order
- So Plaintiffs hired investigators to make pretextual contacts
 - to learn whether Defendants were violating the consent decree

Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998)

- Investigators posed as purchasers
 - Spoke to low-level employees
 - Asked for recommendations of stamps to purchase
 - Placed orders for stamps
 - Posed as normal consumers
 - Misrepresented only their identities and purpose

Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998)

- Defendants asserted that Plaintiff violated three ethical rules:
 - (1) communicating with represented parties,
 - (2) dealings with unrepresented parties, and
 - (3) deceitful conduct.
- Court disagreed on all three points

Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998)

- New Jersey RPC 4.2 prohibits an attorney from communicating with represented parties concerning the subject of the representation
- Plaintiffs did not communicate with a represented party
 - People contacted were not in defendants' litigation control group, as defined under New Jersey law
 - Litigation control group means more than merely supplying factual information or data
 - It means "responsible for or significantly involved in the determination of the company's legal position in the matter"
 - Investigators asked only about the availability of the infringing products

Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998)

- “RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation”
 - Rule applies only to lawyers acting in their capacity as a lawyer dealing on behalf of a client.
 - Investigator was acting as investigator, not as lawyer representing a client
 - Purpose of rule is to protect against an unrepresented person erroneously concluding that the lawyer is disinterested
 - And that error can occur only when a lawyer is acting as a lawyer
- “To apply the rule to the investigation . . . here would serve merely to immunize corporations from liability for unlawful activity”

Apple Corps Ltd. v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998)

- Plaintiff did not engage in deceit or misrepresentation
 - RPC 8.4(c) does not apply to misrepresentations that are
 - solely as to identity or purpose and
 - solely to gather evidence
 - Undercover agents in criminal and civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing.
 - Use of undercover agents to discover ongoing violations of the law is permissible, especially where it would be difficult to discover the violations by other means.
- Court found Defendant in contempt based on evidence submitted by investigators

Trademark cases

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)

- Case re use of trademark on furniture after termination of sales agency
- Plaintiff hired two private investigators to
 - pose as interior designers
 - visit defendants' showroom and warehouse, and
 - secretly tape record conversations with defendants' salespeople.

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)

- Defendants sought to exclude the investigators' evidence as violation of ABA and New York ethical rules, alleging
 - Communication with a party known to be represented by counsel;
 - Attorneys' circumventing a disciplinary rule through actions of another;
 - Conduct involving dishonesty, fraud, deceit or misrepresentation
- Court denied motion to exclude
 - "Hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation"

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)

- OK for undercover investigator to pose as member of the general public engaging in ordinary business transactions with the target
- Otherwise, the legitimate interests of investigating potential unfair business practices would be unduly hindered
- No risk that the low level employees would disclose, or were even aware of, any attorney-client privileged information

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)

- Policy interests behind forbidding misrepresentations by attorneys are not implicated here
 - Interest is in
 - Protecting parties from being tricked into making statements in the absence of their counsel and
 - Protecting clients from misrepresentations by their own attorneys.
 - Investigators posing as interior decorators did not cause sales clerks to make any statements they otherwise would not have made
 - Investigators just recorded the normal business routine in the showroom and warehouse

Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999)

Even if the evidence had been procured by unethical or unlawful means – and it was not – the court would not have to exclude it.

- Second Circuit has held that court has no obligation to exclude such evidence. Citing *U.S. v. Hammad*, 858 F.2d 834, 837 (2d Cir. 1988).
- New York state courts concur.
 - New York follows the common law rule that the admissibility of evidence is not affected by the means through which it is obtained.
 - New York state courts will admit evidence procured by unethical or unlawful means in violation of the NY ethical rules

Chloe v. Designersimports.com USA, Inc., 2009 WL 1227927 (S.D.N.Y. 2009)

- Sales of counterfeit clothing and accessories, infringement of Chloe's trademarks
- Plaintiff hired private investigator
- Investigator used pseudonym in ordering counterfeit handbag

Chloe v. Designersimports.com USA, Inc., 2009 WL 1227927 (S.D.N.Y. 2009)

- Defendant argued that investigator's *credibility was suspect because investigator had concealed her identity*
- Court squarely rejected argument
 - "Courts in the S.D.N.Y. have frequently admitted evidence . . . gathered by investigators posing as consumers in trademark disputes."
 - "[I]t is difficult to imagine that any trademark infringement investigator would announce her true identity and purpose when dealing with a suspected seller of counterfeit goods."
 - "Reliable reports from investigators posing as consumers are frequently recognized as probative and admissible evidence in trademark disputes."

Cartier v. Symbolix, Inc., 386 F.Supp.2d 354 (S.D.N.Y. 2005)

- Trademark case
- Cartier sought preliminary injunction to prevent defendant from altering watches to simulate Cartier watches
- Defendant argued that Court should deny injunction because plaintiff had *unclean hands* due to conduct of undercover investigator
- Court rejected defense
 - “Lawyer’s use of undercover investigator to detect ongoing violations of the law is permissible, especially where it would be difficult to discover the violations by other means.”

A.V. By Versace, Inc. v. Gianni Versace, 2002 WL 2012618 (S.D.N.Y. 2002)

- Defendant claimed that plaintiff's use of a private investigator caused unfair *invasion of his privacy*
- Investigator used false name and posed as a buyer in the fashion industry
- Court rejects defense claim
 - Courts have permitted
 - evidence of secretly recorded conversations between private investigators and salespeople
 - Investigators' interviews with non-party sales clerks to demonstrate "passing off" and actual confusion among consumers

Dareltech, LLC v. Xiaomi Inc. et al (S.D.N.Y., April 11, 2019)

- Plaintiff alleged that defendant Xiaomi's selfie sticks infringed plaintiff's patents
- In November 2018, counsel for both parties have phone conversation
 - Defense counsel takes position that the Court lacks personal jurisdiction
- On December 7, 2018, Xiaomi holds promotional event
 - Hecht (plaintiff's outside counsel) and Cohen (investigator working at Hecht's direction) attend
 - Hecht and Cohen speak with Xiaomi personnel
 - One person is a managerial employee
 - Hecht and Cohen record the conversations on mobile phones
 - Cohen misrepresents identity as "Victoria Carlton" and shows false Facebook page

Dareltech, LLC v. Xiaomi Inc. et al (S.D.N.Y., April 11, 2019)

- Hecht registers under real name, but does not disclose
 - affiliation with law firm or
 - representation of plaintiff
- In one recording, person states he was “with Xiaomi” at its “N.A. division,” which is based in Midtown
 - And that it is “kind of like a secret operation”
- Hecht emails plaintiff’s counsel
 - “Your client likely perjured himself” in his declaration
 - “Xiaomi’s admissions”
 - Increased settlement demand
- Plaintiff moves to disqualify defendant’s counsel and to preclude use of evidence obtained

Dareltech, LLC v. Xiaomi Inc. et al (S.D.N.Y., April 11, 2019)

- Court declines to disqualify but does enter preclusion order
 - Hecht and Cohen violated ethical rules
 - Interviews with represented parties
 - Misrepresentations – use of alias and false Facebook page
 - Did not disclose that they were recording
 - Elicited statements that even they called “admissions”
 - But no showing that the misconduct will taint any subsequent trial proceedings
 - Preclude evidence
 - But no attorneys’ fees, given denial of motion to disqualify

Meyer v. Kalanick, Inc., 212 F.Supp. 3d 437 (S.D.N.Y. 2016)

- Putative antitrust class action against Travis Kalanick
 - Co-founder and then-CEO of Uber
 - Uber later added as defendant
- Uber hired unlicensed private investigator, Ergo
 - Uber GC to Uber Chief Security Officer:
“Could we find out a little more about this plaintiff?”
 - Chief Security Officer then commissioned Ergo to
 - investigate “under the radar”
 - prepare a report that “highlights all derogatories”

Meyer v. Kalanick, Inc., 212 F.Supp. 3d 437 (S.D.N.Y. 2016)

- Ergo approached 28 acquaintances or professional colleagues of plaintiff
 - Pretended to be conducting various research projects
 - Recorded conversations without consent
- Plaintiff learned of investigation and sought discovery
- Defendants resisted based on work product
- Court findings
 - Ergo documents not work product
 - Not created in “anticipation of litigation”
 - Uber had already claimed investigation was to determine whether Plaintiff was a safety threat
 - Crime fraud exception to the work product doctrine applies

Meyer v. Kalanick, Inc., 212 F.Supp. 3d 437 (S.D.N.Y. 2016)

- Investigation was improper, fraudulent and arguably criminal
 - Materially false statements intended to induce people to give information
 - Recordings of phone calls without consent, illegal in some of the relevant states
 - Distinguish from pretexting to investigate misconduct or compliance with court order
 - Although Court rejects proposition that investigators working for a party may make misrepresentations to advance their own interests vis-à-vis their legal adversaries
 - Intrusive inquiries of personal acquaintances and business associates of plaintiff
 - Party must supervise investigator
 - Must ensure no conduct by investigator that party could not ethically do
 - Unlicensed investigator

Meyer v. Kalanick, Inc., 212 F.Supp. 3d 437 (S.D.N.Y. 2016)

- Consent Order
 - Enjoins use of information from the investigation
 - Enjoins defendants from further personal background investigations using false pretenses, unlicensed investigators, etc.
 - Defendants to reimburse plaintiff's attorneys' fees and costs

Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002)

- Purported class action alleging discrimination
- Shell stations allegedly required African-American customers to pre-pay for gas while white customers could pay after pumping
- Plaintiffs sent white customers and African American customers to the same pump within minutes of each other
 - Both asked whether the pump was prepay
 - Plaintiff videotaped interaction with station attendants
 - Before and during litigation
 - With assistance of counsel

Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002)

- Defendants moved for protective order against future taping
 - Argued Plaintiff's conduct was unethical
 - Cited Illinois rules on interactions with represented parties
- Court rejected motion
 - True, station attendants are "represented" by counsel
 - Under NJ law (litigation control group test), station attendants would not even be "represented"
 - But under IL law, the attendants are "represented" for purpose of Rule 4.2 if
 - Their conduct is at the heart of the case, so
 - Their acts or omissions can be imputed; and
 - Their statements may also be admissions
 - Would be same result in PA

Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002)

- However, interactions did not rise to the level of a communication protected by Rule 4.2 (communications with person represented by counsel)
 - Normal business transaction
 - No recorded interaction beyond the question about whether a pump is prepay
 - Lawyers (and investigators) cannot trick protected employees into doing things they otherwise would not do or say, but
 - Lawyers can videotape protected employees going about their activities in what those employees believe is the normal course
 - The videos were like surveillance videos that are routinely admitted
- If there are substantive conversations **outside of** normal business transactions, court will consider admissibility if and when offered at trial

Lessons: Reducing Risks in Pretexting

- Carefully consider ethical rules and court decisions in relevant jurisdiction
- No guarantee that any particular court or judge will allow pretexting
 - Above-cited cases allowing pretexting are
 - not binding
 - generally common law exceptions to the ethical rules
 - highly fact-specific
 - Risk that deceptive conduct will
 - offend a judge
 - harm reputation of company
 - harm reputation of individual lawyers

Reducing Risks in Pretexting

- But you can take steps to greatly reduce the risk
 - Pose only as member of the public or a potential customer
 - Speak only with low-level, public-facing employees
 - Others are more likely to either
 - interact with counsel or
 - potentially bind the company
 - Avoid arguable invasions of personal privacy

Reducing Risks in Pretexting

- Seek only certain types of info
 - Business practices in the ordinary course of business with the public
 - Investigation intended only to note or reproduce usual behavior
 - Information that is objective and preferably available to the public
- Avoid eliciting admissions as to
 - Details
 - Decisions
 - Motivations
 - Effects
- Pre- or post-lawsuit is safest

Reducing Risks in Pretexting

- Hire an investigator instead of doing the investigation yourself
 - Attorney is responsible for investigator's acts, but
 - If attorney needs to testify about the results of his or her investigation, evidentiary and practical concerns
 - Attorneys are held to a higher standard of honesty and fair dealing
- Ensure investigator is licensed
- Give investigator written instructions barring
 - Solicitation of attorney-client privileged information
 - Unlawful conduct
- Ensure any taping is legal in the relevant jurisdiction
- Apply the smell test

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