

The Ethics of Pretexting

John S. Dzienkowski

Professor of Law & John F. Sutton, Jr. Chair in Lawyering and the Legal Process
The University of Texas School of Law

Dissemination in Lawyering: Pretexting in Internal and External Investigations

I. **Obligation of Partners and Supervisory Lawyers to Supervise Nonlawyers**

A. **Hypothetical One: Hiring an Outside Investigator**

An in-house lawyer is asked to hire an outside private investigation firm to determine whether distributors are providing trade information to competitors. What are the lawyer's responsibilities?

B. **Model Rule 5.3**

Under Model Rule 5.3, partners and supervisory lawyers are required to make sure that nonlawyers involved in delivering legal services to clients follow the Model Rules and other law.

- **Applicable to Nonlawyer Employees and Independent Contractors.**
Model Rule 5.3 applies equally to lawyers who hire nonlawyer employees or independent contractors. *See* Model Rule 5.3 Comment 1. The comment specifically mentions investigators as falling within the rule.
- **Scope of Instruction and Supervision Depends on the Nonlawyers Hired.**
The lawyer's obligation depends upon the experience and knowledge of the nonlawyers in complying with the ethical and legal requirements involved in the task. After the Hewlett Packard pretexting scandal, prosecutors, courts, and state bars are more likely to scrutinize the care that lawyers take in hiring and controlling the investigators they hire. *See* 22 ABA/BNA Manual on Prof. Conduct 507 (Oct. 10, 2006).
- **Obligation applies to In-house Lawyers and Outside Law Firms.**
Model Rule 5.3 applies to in-house and outside counsel. For in-house counsel, there are no partners, but the rule would apply to the general counsel and others who "individually or together with other lawyers possess comparable managerial authority" in the entity.
- **Compliance with Model Rules and Other Law.** This section of the outline focuses on violations of the Model Rules and selected rules in certain states. But if a private investigator violates other law while under the supervision of a lawyer, such a violation can become a violation of the Model Rules for the lawyer.

C. **Duty to Implement a System for Compliance.**

Partners and supervisory lawyers must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that nonlawyers' conduct is compatible with the rules of the legal profession. Rule 5.3(a).

D. Partner or Supervisory Lawyer is Responsible if Lawyer Orders Conduct or, With Knowledge, Ratifies the Conduct.

Of course, a lawyer who directs another to violate a rule is responsible for the violation. But Model Rule 5.3(c)(1) expands the responsibility to include situations in which a lawyer, with knowledge of the specific conduct, ratifies the nonlawyer's actions. For example, if an investigator told a lawyer that he planned on taking a course of action that violated a rule or other law and the lawyer directly or indirectly ratified this action, the lawyer would be responsible.

E. Partner or Supervisory Lawyer is Responsible if that Lawyer "Knows of the Conduct at a Time When Its Consequences Could Be Avoided or Mitigated but Fails to Take Reasonable Remedial Action"

The ABA sought to limit the use of vicarious responsibility with violations of the Model Rules; however, the ABA did want those with knowledge and responsibility to take action to mitigate and stop violations of the rules. Thus, Model Rule 5.3(c)(2) requires partners and supervisory lawyers who learn about a nonlawyer's conduct (that involves a violation of the rules) to take reasonable remedial action to avoid or mitigate that violation. But such reasonable remedial action must only be taken if the lawyer can avoid or mitigate the violation of the rules. In the context of investigator's transgressions, it will depend upon when the lawyer learns about the violation. The existence of a pending court or grand jury proceeding will increase the lawyer's obligation to act. Such actions of mitigation will include disclosure of the violation.

F. Hypothetical Two: Investigator Hired by Corporate Employees

A corporate president decides to hire an outside private investigation firm and establishes a committee to oversee the investigation without consulting any in-house or outside lawyers. Does the noninvolvement of the corporate lawyers change anything?

G. Evidence Obtained by Investigator Hired by Client and Not Lawyer

Philadelphia Ethics Opinion 2001-10 (2001) held that it was not against the rules of ethics for a lawyer to use evidence obtained by an investigator who violated an ethics rule, if that investigator was hired by the client without the consent or knowledge of the lawyer and if the lawyer did not know in advance about the investigator's proposed conduct. *See also* Jones v. Scientific Colors, Inc., 201 F. Supp.2d 820 (N.D.Ill. 2001). A similar result is suggested in Formal Ethics Opinion 95-306 (1995), which states that use of such evidence would not subject the lawyer to a violation of Model Rule 5.3's ratification language.

H. Should Lawyer Leave Hiring and Direction of Investigator to Client?

Professor Bruce Green has suggested that lawyers may leave hiring of an investigator to the client to avoid Model Rule 5.3 and Model Rule 8.4 exposure. *See* 22 ABA/BNA Manual on Prof. Conduct 507 (2006)(quoting Bruce Green). Of course, this may work when the client is an individual such as a spouse in a divorce case. But when the lawyer is an in-house counsel to a

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