McGeorge Law Review

Volume 41 | Issue 2 Article 2

1-1-2009

Ethics of Pretexting in a Cyber World

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Ethics of "Pretexting" in a Cyber World

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Lawyers are investigators. They require information to counsel clients about their rights and obligations. In many instances, important information is in the hands of third parties. When such information must be acquired without alerting the third party (such as a competitor, an adverse party in litigation, or a disgruntled employee), lawyers may gather information anonymously. For sources such as public records and public websites, the anonymous gathering of information typically presents no major ethics issues.[1]

But what if the lawyer seeks to obtain information by stealth, misrepresenting (or failing to accurately represent) the purpose of a contact with a third party? Such stealthy contact, by a lawyer or an intermediary, such as a private investigator, is called "pretexting" and presents unique ethical challenges.[2] This Article outlines some of those challenges and suggests some directions that ethics and professional responsibility law can take in an increasingly interconnected yet anonymous cyber world.[3]

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1. *See, e.g.*, Jason Boulette & Tanya DeMent, *Ethical Considerations for Blog-Related Discovery*, 5 SHIDLER J.L. COM. & TECH. 1 (2008), *available at* http://www.lctjournal.washington.edu/Vol5/a01oulette DeMent.html (on file with the *McGeorge Law Review*) (suggesting that "passive review" of a blog is "comparable to review of an unprivileged document voluntarily produced by [a] party").

2. The precise definition of "pretexting" may vary with the context of a matter. The Federal Trade Commission (FTC), for example, applied the Gramm-Leach-Bliley Act and narrowly defined pretexting to include only the use of false pretenses to obtain personal financial information, such as bank balances. *See* Fed. Trade Comm'n (FTC), The Gramm-Leach-Bliley Act, http://www.ftc.gov/privacy/privacyinitiatives/retexting.html (last visited Dec. 30, 2009) (on file with the *McGeorge Law Review*). In most instances and for purposes of this Article, the pretexting circumstance involves an effort by counsel, through some form of deception or deliberate withholding of information, to obtain information relevant to the investigation. *See generally* Gerald B. Lefcourt, *Fighting Fire with Fire: Private Attorneys Using the Same Investigative Techniques as Government Attorneys: The Ethical and Legal Considerations for Attorneys Conducting Investigations*, 36 HOFSTRA L. REV. 397 (2007).

3. This Article does not address other sources of law, such as tort and criminal law, which may bear on the practice of pretexting. The recent pretexting incident involving Hewlett-Packard, for example, led to litigation and the passage of both federal and California statutes outlawing the receipt of telephone records through pretexting. *See* Kevin Poulsen, *First 'Pretexting' Charges Filed Under Law Passed After HP Spy Scandal*, WIRED.COM, Jan. 9, 2009, http://www.wired.com/threatlevel/2009/01/first-pretextin/ (on file with the *McGeorge Law Review*); Matt Richtel, *Hewlett-Packard Settles 'Pretexting' Suit*, N.Y. TIMES, Feb. 14, 2008, at C-5, *available at* http://www.nytimes.com/2008/02/14/business/worldbusiness/14iht-hp.1.10033982.html; *Bill Signed to Ban Pretexting Inside Bay Area (California)*, OAKLAND TRIB., Oct. 1, 2006, *available at* http://findarticles.com/p/articles/mi_qn4176/is_20061001/ai_n16760833/?tag=content;col1/ai_n16760833/?tag=content;coll.

Moreover, although the standard for a criminal conviction is likely higher than for an ethical sanction, online pretexting may lead to criminal charges in addition to charges for ethical violations under existing law. *See, e.g.*, U.S. v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009) (overturning a conviction for pretexting under the Computer Fraud and Abuse Act because of vagueness). *Drew* is an exceptional case, because pretexting was part of a pattern of cyber-bullying that led to the victim's suicide. *Id.* at 452. However, *Drew* points the way to

I. BASIC AUTHORITIES ON PRETEXTING

A. *Three Model Rules Apply to Pretexting*

The Model Rules of Professional Conduct (Model Rules)[4] do not expressly ban or authorize the practice of pretexting. Ethics authorities, however, suggest that at least three basic principles in the Model Rules may bear on the practice.[5]

First, Model Rule 4.1(a) forbids a lawyer from making false statements of material fact to a third person.[6] Thus, if failure to identify the true purpose of a contact with a third party constitutes a "false statement," pretexting could violate this Rule.[7]

Second, Model Rule 4.2 prohibits a lawyer from communicating about the subject 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 court order.[8] Thus, contacts with a represented person via pretexting could violate this Rule.[9]

Third, Model Rule 8.4(c) bans conduct by a lawyer that involves dishonesty, fraud, deceit, or misrepresentation.[10] Thus, unless there is an exception that permits misrepresentation for good purpose, this Rule may also prohibit pretexting.[11]

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criminal charges for online pretexting under federal law.

4. MODEL RULES OF PROF'L CONDUCT (2009), *available at* http://www.abanet.org/cpr/mrpc/rpc_toc.html.

5. *See* Letter from Chris J. Hoofnagle, Dir., Elec. Privacy Info. Ctr. (EPIC), W. Coast Office, to State Bar Ethics Comm. (Feb. 21, 2006), *available at* http://epic.org/privacy/iei/attyltr22106.html (on file with the *McGeorge Law Review*) (reviewing ABA Model Rules implicated by pretexting).

6. MODEL RULES OF PROF'L CONDUCT R. 4.1(a).

7. *See* Barbara M. Seymour, Office of Disciplinary Counsel, S.C. Sup. Ct., Presentation at 33rd Annual Conference on Worker's Compensation: Pre-Texting & Dissembling: Lawyers and Little White Lies (2009), http://www.scwcea.org/presentations/2009_pretexting.pdf (on file with the *McGeorge Law Review*) (summarizing applicable rules and sample cases regarding a lawyer's truthfulness in statements to others).

8. MODEL RULES OF PROF'L CONDUCT R. 4.2.

9. *See* ABANet.org, Going Undercover: Issues in Pretext Investigations, Feb. 2008, *available at* http://www.abanet.org/media/youraba/200802/article05.html (on file with the *McGeorge Law Review*) ("'Rule 4.2 is the one that most often causes grief for lawyers conducting investigations' . . . . Rule 4.2 suggests that if the subject of a potential sting operation is represented by counsel, the lawyer interested in the investigation must contact the party's lawyers *before* conducting any operation." (quoting Professor James Fischer of Southwestern Law School)); *see also* Pamela D. Pengelley, *Fessing up to Facebook: Recent Trends in the Use of Social Network Websites for Insurance Litigation*, LEXISNEXIS.COM, Mar. 22, 2009, http://law.lexisnexis.com/practiceareas/Insurance/Pamela-D-Pengelley-on-Fessing-up-to-Facebook-Recent-Trends-in-the-Use-of-Social-Network-Websites-for-Insurance-Litigation (on file with the *McGeorge Law Review*) ("[L]awyers' rules of professional conduct strictly prohibit them from making direct contact with parties who are represented by counsel, and this certainly includes contact by way of Facebook. It would be a breach of a lawyer's duties of honesty and candor to create a false profile in an attempt to elicit information from another party's private Facebook profile.").

10. MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

11. *See* Patrick M. Arenz, *The Truth Behind Pretexting: In-house Investigations and Professional Concerns*, RKMC.COM, Apr. 2007, http://www.rkmc.com/The-Truth-Behind-Pretexting-In-house-Investiga

Lastly, all of the foregoing Model Rules apply to a lawyer's supervision of non-legal staff and investigators.[12]

B. Recent Cases and Ethics Opinions Citing the Model Rules

Several recent ethics opinions, citing combinations of these Rules, suggest that pretexting is a disfavored, though not absolutely prohibited, practice.

In the case of *In re Crossen*, the Massachusetts Supreme Court disbarred two lawyers, because their deceptive conduct "struck at the heart of the lawyer's professional obligations of good faith and honesty."[13] Lawyers who were unhappy with a judge's decision to award hundreds of millions of dollars against their client in a civil dispute engaged in a complex scheme to obtain evidence that the judge was biased, including evidence based on false employment interviews with the judge's former law clerk.[14]

Additionally, in the case of *In re Pautler*, the Colorado Supreme Court held that "[p]urposeful deception by an attorney . . . was intolerable," even when undertaken in support of a public purpose.[15] The *Pautler* court also held that a prosecutor could not impersonate a public defender as a means to obtain the surrender of a criminal suspect.[16]

Furthermore, in *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,[17] the Eighth Circuit affirmed the imposition of sanctions and exclusion of evidence where lawyers hired private investigators to conduct conversations with employees of rival dealers while surreptitiously recordeing the conversations. The court emphasized that counsel knew that the rival dealers were represented by counsel and that investigators failed to identify their purpose in the conversations.[18]

Most recently, in a 2009 ethics opinion,[19] the Philadelphia Bar Association's Professional Guidance Committee opined that it is a "deceptive" practice for a

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tions-and-Professional-Responsibility-Concerns.htm (on file with the *McGeorge Law Review*) (referencing the Hewlett-Packard dispute and suggesting that Rules 4.1(a) and 8.4(c) "on their face, prevent lawyers from pretexting during investigations. There is no clearer example of dishonesty and misrepresentation than calling a company and claiming to be someone you are not to obtain the customer's private records").

12. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (outlining a lawyer's duty to supervise nonlegal personnel). *See also id.* cmt. 2 (requiring "lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct").

13. 880 N.E.2d 352, 357 (Mass. 2008). *See* John R. Ellement, *SJC Blasts 2 Lawyers for Ethics Breach*, BOSTON GLOBE, Feb. 7, 2008, at B1, *available at* http://www.boston.com/news/local/articles/2008/02/07/sjc_blasts_2_lawyers_for_ethics_breach/ (summarizing the case's ten-year background).

14. *In re Crossen*, 880 N.E.2d at 356-57.

15. 47 P.3d 1175, 1176 (Colo. 2002).

16. *Id.*

17. 347 F.3d 693, 695 (8th Cir. 2003).

18. *Id.* at 699-700.

19. *See* Phila. Bar Ass'n., Prof'l Guidance Comm., Op. 2009-02, *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf [hereinafter Phila. Op. 2009-02] (emphasizing that the opinion was only "advisory").

lawyer to contact a witness through an investigator by asking to "friend" the witness on Facebook. By failing to indicate the actual purpose of the contact (i.e., gaining cross-examination material to challenge the credibility of the witness), the lawyer could deceive the witness by omission.[20]

II. WHAT'S WRONG WITH PRETEXTING?

In essence, the aforementioned Model Rules, cases, and other ethics authorities, read broadly, suggest the perhaps unremarkable principle that lawyers must never lie.[21] Yet, that simplification of legal ethics cannot be true in every case.[22] Ultimately, the pursuit of justice may require some forms of deception at some times.[23]

Prosecutors, for example, traditionally have been permitted to use some "dissemblance" in aid of law enforcement objectives.[24] Similarly, lawyers practicing in private contexts may employ investigators to pose as customers to expose infringement of intellectual property rights[25] and to demonstrate civil rights violations, such as employment or housing discrimination.[26] More generally, a lawyer, paralegal, or investigator is not required to state the purpose

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20. *Id.*

21. *See, e.g.*, *In re* Kalil's Case, 773 A.2d 647, 648 (N.H. 2001) ("Because 'no single transgression reflects more negatively on the legal profession than a lie,' it is the responsibility of every attorney at all times to be truthful." (quoting *In re* Nardi's Case, 142 A.2d 1199, 1200 (N.H. 1998))).

22. Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 605 (2005) ("[T]he seemingly rigid principles that lawyers are responsible 'at all times to be truthful' and that 'a license to practice law requires allegiance and fidelity to truth' occasionally bend to allow deceptive lawyering." (quoting *In re Kalil's Case*, 773 A.2d at 648)).

23. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 772 (2006) ("[T]here are circumstances in which zealous representation, which embraces the ethical requirements of competence and confidentiality, can require a lawyer to make a false statement to a court or to a third person, or to engage in other conduct involving dishonesty, fraud, deceit, or misrepresentation.").

24. *See, e.g.*, Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123, 142 (2008) (explaining that lawyers often supervise government investigators in uncovering racial discrimination, political corruption, and organized crime through pretexting). Arguably, criminal defense lawyers may enjoy the same leeway in representing their clients. For example, in the case of *In re Hurley*, a lawyer defending a client accused of child molestation employed an investigator to obtain the child's old computer through a free exchange program. No. 07-AP-478-D, slip op. at 4 (Wis. Feb. 5, 2008). In addition to finding that the lawyer "acted reasonably and with adequate safeguards," the court stated that "[h]e acted as the Constitution compelled him to act." *Id.* at 21. *See also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 402 (1975), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=17996 [hereinafter N.Y. Ethics Op. 402] (stating that a lawyer may engage an investigator to befriend a prosecution witness in order to determine the truthfulness of testimony, but must avoid deceit, misrepresentation, or invasions of privacy).

25. *See* Ala. State Bar Office of Gen. Counsel, Form. Op. 2007-05, *available at* http://www.alabar.org/ogc/PDF/2007-05.pdf (suggesting that a lawyer may investigate suspected infringers).

26. *See* Mark Rasch, *Liar, Liar, and Pretexting*, SEC. FOCUS, Sept. 19, 2006, http://www.securityfocus.com/columnists/417 (on file with the *McGeorge Law Review*) ("Government investigators and others use 'testers'—people who apply for jobs, housing, or other benefits by giving false names and identities in order to root out discrimination.").

for which information may be used when gathering facts about a case, so long as the techniques employed do not amount to fraud.[27]

If lying alone does not explain the general proscription against pretexting, what does? The true concern lies in the degree of intrusion and the type of information that may be obtained through deception. Simply put, a lawyer (or an investigator at the lawyer's behest) may be precluded from tricking subjects into "saying or doing things that they would not otherwise say or do in their normal affairs."[28] Moreover, lawyers and investigators cannot engage in "extreme methods" of collecting information, "such as breaking and entering, actionable invasions of privacy, and unreasonable searches and seizures."[29] These extreme (and perhaps illegal) methods ultimately reflect poorly on a person's fitness as a lawyer, implicate attorney/client privilege,[30] and undermine the public's faith in the legal system.[31]

In recent years, the reach of the Model Rules regarding deceptive practices in investigations has been the topic of "much discussion."[32] Some states adapted their professional conduct rules to permit "lawful covert activity" by or at the direction of lawyers.[33] These meager and sometimes conflicting guidelines[34] suggest that lawyers must proceed with great caution in this area.[35]

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27. *See* N.Y. Ethics Op. 402, *supra* note 24 (explaining that an investigator may befriend witness to determine the truthfulness of testimony). *See generally* Kevin Bank, *Not Telling the Whole Truth: How Much Leeway Do Lawyers or Investigators Working with Them Have to Feign Identity?*, WASH. STATE BAR NEWS, June 2008, http://www.wsba.org/media/publications/barnews/jun08-bank.htm (suggesting that lawyers and investigators may hide the true identity and purpose of an inquiry, "particularly in the *pre-complaint stage*" (emphasis added)).

28. Richmond, *supra* note 22, at 605.

29. CHARLES P. BAKER, ABA TORT TRIAL & INS. PRACTICE SECTION, CONFLICTS BETWEEN THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COURT DECISIONS CONCERNING INVESTIGATIONS 6 (2006), *available at* http://www.fitzpatrickcella.com/images/pub_attachment/attachment366.pdf. Such a distinction does not depend upon whether the lawyer or investigator works for a governmental body or a private citizen. *Id. See also* N.Y. Ethics Op. 402, *supra* note 24; text accompanying *supra* note 24.

30. In this regard, Model Rules proscribing contact between a lawyer and a represented party ensure that invasions of attorney/client privilege are avoided. For example, although parties are generally free to contact other parties, *see* MODEL RULE OF PROF'L CONDUCT R. 4.2, cmt. 4 (2009), a lawyer cannot "mastermind" contacts with a represented party to obtain information that the lawyer could not obtain directly. *See, e.g.*, Trumbull County Bar Ass'n v. Makridis, 671 N.E.2d 31 (Ohio 1996) (holding that a plaintiff's lawyer should be publicly reprimanded for wrongly suggesting that her client contact the defendant about proposed testimony shortly before trial). Further, a lawyer who contacts an unrepresented former employee of an adversary must not induce the former employee to divulge privileged communications that occurred during the person's prior employment. ABA Comm. on Ethics and Prof'l Responsibility, Form. Op. 359 (1991).

31. *See generally* William H. Fortune, *Lawyers, Covert Activity, and Choice of Evils*, 32 J. LEGAL PROF. 99 (2008) (suggesting that "lawful covert activity" within the bounds of social norms should be permitted).

32. *See* ABA CTR. FOR PROF'L RESP., ANN. MODEL RULES OF PROF'L CONDUCT 612 (5th ed. 2003).

33. *See, e.g.*, IOWA RULES OF PROF'L CONDUCT R. 8.4, cmt. 6 (2005), *available at* http://www.iowacourts.gov/wfdata/frame2395-1066/File1.pdf ("It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules."); OR. RULES OF PROF'L CONDUCT R. 8.4(b) (2005), *available at* http://www.osbar.org/_docs/rulesregs/orpc.pdf (providing virtually identical language) ("[I]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert

III. FUTURE DIRECTIONS: THE INTERNET AND BEYOND

As one famous cartoon proclaims, "On the Internet, nobody knows you're a dog."[36] This joke reflects the simple fact that the Internet and other forms of distance communications permit lawyers and investigators to operate anonymously with great ease and even adopt false identities for purposes of gathering information.[37] As a result, ethical lines may become blurry.

Consider the following examples, all based on a scenario where a lawyer wishes to obtain information about the products and services of an adversary company for purposes of litigation:

A. The lawyer, or an investigator at the lawyer's direction, logs on to the adversary's web-site and prints out information freely available on the site.

B. The lawyer/investigator logs on to the site, and, when requested, provides true information about his/her identity. Once registered, the lawyer/investigator reviews and prints information freely available on the site.

C. The lawyer/investigator proceeds as in B, but gives false information about his/her identity.

D. The lawyer/investigator purchases goods or services from the adversary, using his/her true identity. As a result of the purchase, the

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activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.").

34. *See* Charles P. Baker & Joshua I. Rothman, *When the Model Rules and Court Decisions Clash: Should There Be an Investigative Exception for Certain Misrepresentations?*, 36 THE BRIEF 1, 4 (Summer 2007), *available at* http://www.fitzpatrickcella.com/images/pub_attachment/attachment457.pdf ("The present contradiction between the courts and the Model Rules makes it hard, at least in some jurisdictions, to know what to do.").

35. *See* JEREMY FEINBERG, N.Y. PROF'L RESP. REP., REPORT ON PRETEXTING—RECENT CASES & ETHICS OPINIONS 1 (June 2009), http://lazar-emanuel.com/Report%20on%20Pretexting%20%E2%80%93%20Recent%20Cases%20and%20Ethics%20Opinions.pdf (noting that pretexting is permitted in a "very narrow category of circumstances"); N.Y. County Lawyers' Ass'n, Comm. on Prof'l Ethics, Form. Op. 737 (2007), *available at* http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf (stating that it is "generally unethical for a non-government lawyer to utilize and/or supervise an investigator who will employ dissemblance in an investigation . . . .").

36. First appearing in 1993, the cartoon has become a cultural icon. Peter Steiner, Cartoon, *"On the Internet, Nobody Knows You're a Dog"*, NEW YORKER, July 5, 1993, at 61, *available at* http://www.newyorkerstore.com/Dogs/On-the-Internet-nobody-knows-youre-a-dog/invt/106197. *See* JANNA QUITNEY ANDERSON, IMAGINING THE INTERNET: PERSONALITIES, PREDICTIONS, PERSPECTIVES (2005), *relevant excerpts available at* http://www.elon.edu/e-web/predictions/bookexcerpts.xhtml (suggesting that Steiner's cartoon "will live forever as an online-culture touchstone because it first seemed to reflect the ability to be completely anonymous on the Internet").

37. *See* Robert Vamosi, *Pretexting: Fraud by Any Other Name*, CNET, Sept. 8, 2006, http://reviews.cnet.com/4520-3513_7-6636363-1.html (on file with the *McGeorge Law Review*) ("Using pretexting and the Internet, anyone can pretend to be anyone else . . . .").

lawyer obtains information that non-purchasers cannot freely obtain, such as a copy of the adversary's standard contract or warranty information.

E. Same as in D, but the lawyer/investigator uses a false identity.

F. The lawyer/investigator engages in more detailed communication with the adversary, perhaps by posing a question on the adversary's blog or through an online customer interaction.

G. Same as F, but the lawyer/investigator uses a false identity.

H. The lawyer/investigator seeks to "friend" an employee of the adversary on a social network to gain access to the employee's "wall" of personal information.

I. Same as in H, but the lawyer/investigator uses a false identity.

J. The lawyer/investigator successfully "friends" the employee who automatically accepts all "friend" requests. The lawyer/investigator begins to communicate with the employee, asking about the employee's job and the business of the adversary.

K. Same as J, but the lawyer/investigator uses a false identity.

These examples illustrate several points about the ethics issues involved with pretexting in cyberspace. First, the problem is not whether the lawyer/investigator uses a false identity to gain information, but rather the degree of intrusion involved in the inquiry and the risk that confidential or even privileged information may be revealed.[38] In this regard, examples A through E present little concern. Even if the adversary is deceived as to the identity of the lawyer/investigator or the purpose of the inquiry, there is little risk of harm, because the information obtained is freely available to anyone who asks for it.

Furthermore, the purpose of the lawyer/investigator's inquiry in examples A through E is not dispositive. These contacts are probably acceptable regardless of whether the lawyer/investigator has a "good" purpose—to investigate crime or remedy discrimination—or a more mundane or selfish purpose—to gather information for a conventional lawsuit.

As we move farther along the spectrum to examples F and G, the above observation still applies. So long as there is no deliberate probing into confidential or privileged areas, the character of the inquiry does not matter.

Moreover, any concern about the use of a false identity in examples F and G disappears, because the adversary should be wary of dealing with anyone who makes such a contact. In such situations, the information the lawyer/investigator obtains almost certainly will be a cautious statement of "official" company views

38. *See supra* Part II.

that is similar to public information freely available in examples A through E. Thus, examples F and G should present no ethical problems.

As we move toward the more extreme end of the spectrum (examples H and I), concerns for intrusiveness and risk of access to confidential information increase. As the Philadelphia ethics opinion suggests, there must be some assurances that the other party understands the purpose of the contact.[39] Indeed, a good case could be made that, absent informed consent or court order, a flat ban on these types of contacts should apply.

One might argue that a limited exception should apply for truly "good" or "important" inquiries, based on rough cost-benefit calculus. However, allowing such an exception is problematic, because determining which inquiries are good or important is highly subjective. Additionally, the risks involved are difficult to calculate in advance. The subject may reveal a huge amount of confidential or personal information. On the other hand, the opposite may be true. Simply put, predicting the outcome is impossible.

Examples J and K are at the most extreme end of the spectrum. Here, the identity of the lawyer/investigator and the purpose of the inquiry are the *only* factors that determine whether the inquiry is permitted. This is not an unfocused effort to gain access to whatever information may already exist. Rather, the inquirer seeks to interact directly with the subject and to obtain information that could not otherwise be obtained absent court processes. In these cases, ethics authorities should require the lawyer/investigator to provide a "very good" purpose for the inquiry, because there is no supervision and no limit on the scope of the inquiry.

Indeed, limiting such inquiries to public institutions (chiefly, law enforcement authorities) or public interest claims (such as detection of discriminatory practices in employment or housing) may be appropriate based on assurances of a "good" purpose and on the assumption that government and public interest lawyers/investigators, who are experienced in the field, are the only persons who can be trusted not to abuse such investigative techniques. Such inquiries, moreover, should not be used to coax privileged information out of a witness.

IV. CONCLUSION

Modern computer and communication devices (especially the Internet) offer easy and immediate access to vast amounts of information.[40] Lawyers can employ

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39. *See* Phila. Op. 2009-02, *supra* note 19 (suggesting that the inquirer could "forthrightly ask for access" to the information in a manner "[t]hat would not be deceptive and would of course be permissible"). It should be noted that the Philadelphia opinion did not address the Rule 4.3 problem (lawyer contact with a represented party), because the witness was not represented by counsel.

40. Acquiring evidence through social networking sites, for example, has become increasingly popular in civil and criminal cases. *See, e.g.*, Damiano Beltrami, *I'm Innocent: Just Check My Status on Facebook*, N.Y. TIMES, Nov. 12, 2009, at A-25, *available at* http://www.nytimes.com/2009/11/12/nyregion/12

such technology to improve the quality of their representation of clients. Ethics authorities should not arbitrarily limit the benefits of such information or favor certain categories of lawyers over others.[41]

Rather, the search should be for neutral principles that reasonably balance the benefits and risks of such technology. These neutral principles should focus less on whether the lawyer/investigator is operating anonymously or with a pseudonym. Rather, they should concentrate more on the intrusiveness of the technique and the risk that confidential or privileged information may be improperly revealed in the process.

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facebook.html ("With more people revealing the details of their lives online, sites like Facebook, MySpace and Twitter are providing evidence in legal battles."); Ken Strutin, *Evidence in an Age of Self-Surveillance*, N.Y. L.J., Mar. 11, 2009, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202428950936&slreturn=1&hbx login=1 (on file with the *McGeorge Law Review*) ("Internet searching has emerged as a necessity in legal investigation.").

41. *See* Ken Strutin, *Evidence on Social Networking Sites*, N.Y. L.J., Nov. 11, 2009, http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202435338350 (on file with the *McGeorge Law Review*) (suggesting that "overarching principles of fairness and reciprocal discovery" ought to apply "with equal force" to prosecution and defense in order to permit access to "evidence [that] hides in plain sight").

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