

3 Ethical Traps Awaiting The Devious Lawyer

By **Andrew Strickler**

Law360, New York (May 6, 2016, 12:09 PM EDT) -- When it comes to lawyers and lying, even a cursory glance at bar rules and ethics opinions provides a pretty clear road map: Don't go there.

But a closer look at the line between mundane pretrial research and, say, hiring an investigator to dig up information on a legal opponent, reveals some tricky ethical areas.

Add to that some divergent case law and disciplinary attitudes toward when and why lawyers can employ subterfuge, and you've got reasons to think twice before doing anything that might be deemed dupery, said Robert Sacoff of Pattishall McAuliffe Newbury Hilliard & Geraldson LLP.

"There is a tactical use of the ethical rules in the courts to try to get evidence thrown out or get lawyers sanctioned, and any kind of perceived deception is the kind of thing that can bite you in the butt in a dangerous way," Sacoff said.

Below are three ethical traps to avoid when it comes to employing deception:

Situations of Extreme Facts

For lawyers wondering if extenuating circumstances soften the "no lying" rules when the attorney wants to protect a vulnerable client or otherwise do the right thing, the short answer is no.

A number of courts and disciplinary bodies have come down hard on lawyers who lied for what many would look at as all the right reasons, including in situations where a lie might have headed off an egregious wrong.

The standout example is the Colorado Supreme Court ruling *In re: Mark Pautler* from 2002. In that decision, the court affirmed a finding of misconduct against Mark Pautler, a onetime county deputy district attorney.

At the scene of grisly multiple homicide in 1998, Pautler cooperated with police negotiating with the main suspect. Speaking with the man by phone as he demanded a lawyer, Pautler pretended to be a public defender who would represent the man and helped convince him to surrender, according to court documents. The suspect later did so without further bloodshed.

While agreeing that Pautler acted selflessly and did not try to get the suspect to admit to anything he hadn't already confessed to, the court concluded that the lawyer's bald-faced lie justified the disciplinary sanction.

"The fact that he lied for what he thought was a good reason does not obscure the fact that he lied — in an important circumstance and about important facts," the court concluded.

A Colorado bar ethics opinion issued last year was similarly strict on online deception and anonymity. The committee considered a range of ethical pitfalls, including the possibility that even a notification of a request from a lawyer to access the social media profile of a person involved in a client matter could be put to ill purposes.

"No exception in the rules permits a lawyer to employ deception or subterfuge to gain access to restricted information through social media," the opinion states.

At the other end of the spectrum is D.C. Bar Ethics Opinion 323, which considers the thorny problem of government agent-lawyers who use false identities or otherwise employ outright deceit as part of their investigative work.

Finding a loophole, the committee concluded that the blanket prohibition against lawyer deceit simply doesn't apply to this category of lawyer — such as FBI agents who are also attorneys — because their "non representational" work was within the law. The committee also said an exception was justified because such misrepresentations didn't call into question the lawyers' professional competency.

"Where is the logical connection?" Sacoff said. "The lesson is different courts and different ethics bodies, which are two different ecosystems, can have very different points of persuasion on these questions."

Using Online Disguises

In April, the New Jersey high court added to growing case law around the nation about lawyers and online snooping.

In a unanimous opinion, the court said two lawyers accused of enlisting a paralegal to send an online Facebook "friend" request to a man suing their client — the paralegal did not reveal her employer — could be investigated by the state's top ethics official after a complaint had been dismissed.

While no final determination has been made on the surreptitious Facebook snooping, the facts appear to get into the "no go" ethical zone of online disguises and lawyers using agents to glean protected information, said J. Alexander Lawrence, a litigation partner at Morrison & Foerster LLP.

Online anonymity and the use of dummy profiles "might be part and parcel of the online world, but just because people do it doesn't mean lawyers can do it," he said.

Amid that pending case, a California judge in March also waded into the relatively new ethical area when he secured a deal between lawyers for Google Inc. and Oracle America Inc. to refrain from scouring jurors' social media accounts in the run-up to a high-profile trial.

In separate filings, both sides consented to U.S. District Judge William Alsup's proposed ban on all

Internet jury research both before and during the proceeding.

Lawrence said the brokered deal acknowledged an ethically tricky issue of how lawyers can use public information found online at trial, along with the risk that personal information gleaned without the knowledge of the court, jurors or opposing counsel could be used surreptitiously to help sway the jury.

“There is no rule that says you can’t do this, but the judge wasn’t comfortable with it,” he said. “There will probably be other judges who will do this kind of thing in the future; that should be expected.”

Ignorance of Jurisdictions and Case Law

Outside clear-cut breaches of the rules against deceit and lies to third parties on behalf of clients, courts and ethics groups have often preferred highly fact-specific takes on gray-area issues of deception, experts said.

In many instances, the conduct analysis hinges on whether a lawyer — or the lawyer’s investigator, employee or other agent — has used any kind subterfuge to elicit information or an admission that they couldn’t have gotten otherwise.

In the arena of IP pretext investigations and the common practice of using cloaked identities to buy products not readily available in stores, commercially focused jurisdictions have been generally more lenient on deception, said Sacoff, who has lectured on the topic of pretext investigation ethics.

But even in places like New York and New Jersey, lawyers should avoid doing pretext investigations themselves, he cautioned. Instead, they should employ experienced investigators familiar with the local rules around the use of false names, permissible employee contact, and the line between sneakiness and deception.

“In terms of the ethics rules, there isn’t a real distinction when you use an investigator,” Sacoff said. “But there is a matter of the optics when the lawyer is doing this kind of thing themselves. It seems closer to home to the lawyer and their ethical guidelines.”

--Editing by Jeremy Barker and Sarah Golin.