

The HP Scandal: Lessons for Corporate Counsel in Hiring Investigators and Other Outside Service Providers

The Hewlett Packard (HP) scandal has raised alarms for the many companies and lawyers who utilize investigators. After a brief overview of the HP affair, this advisory summarizes the legal principles that govern the liability of lawyers and companies that hire such providers and then suggests some steps that can be taken to limit such liability.

What HP Did

To help find the source of a media leak by one of its board members beginning in 2005, global technology company HP engaged an outside private investigation firm, which in turn retained subcontractors that employed unethical and likely illegal surveillance tactics to accomplish what they had been hired to do. These invasive techniques included impersonating board members and journalists to obtain their phone records, a practice known as “pretexting,” and attempting to track the emails of journalists by sending them emails with an embedded software attachment that transmits back information if the email is forwarded to someone else (presumably the source of the leak).

Since these techniques came to light, HP and its management have been investigated by the State of California, the FBI, and Congress. California has brought criminal charges against five people, including chairwoman of the board Patricia Dunn and senior counsel and director of ethics Kevin Hunsaker, who have already resigned their positions. Published accounts indicate that HP’s General Counsel, Ann Baskins, also

oversaw the investigation to some extent and she has also resigned.

HP’s woes highlight several issues that businesses and their lawyers should consider when working with investigators and that also apply to other service providers.

Potential Liability for Conduct of the Service Provider

Pretexting and other investigative techniques implicate federal and state laws that broadly prohibit deceptive conduct. Some examples are:

- Computer Fraud and Abuse Act, 18 U.S.C. § 1030: Criminalizes unauthorized access to a computer and information stored on a computer;
- Electronic Communications Privacy Act, 18 U.S.C. § 2510-2712: Criminalizes unauthorized interception of real time communications and unauthorized access to stored communications;
- Fair Credit Reporting Act, 15 U.S.C. § 1681: Prohibits improper use of credit reports;
- Wire Fraud Act, 18 U.S.C. § 1343: Prohibits transmitting any wire communication for the purpose of defrauding someone or obtaining money by false pretenses;
- N.Y. Penal Law § 250 (2006): Prohibits unlawful surveillance and eavesdropping;
- Common law: torts of trespass, intentional infliction of emotional distress and conversion.

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Employers may have more freedom to conduct surveillance of their employees on company-owned computers and phones.¹ However, state and federal laws are complex and ever-changing, and the laws in other countries may differ substantially due to different cultural values.

Direct Liability

A client or lawyer may be held directly liable for the unlawful acts of an investigator if the client or lawyer participates in the acts or ratifies them. They may also be liable for negligence based on the hiring of an underhanded private investigator, if a plaintiff can prove negligent entrustment or negligent supervision of that investigator.²

Vicarious Liability

If the investigator is deemed to be an agent, the party who hires him is generally liable for the torts committed by the investigator within the scope of the investigator's duties. An investigator will usually be considered an agent if the client or lawyer has the right to exercise control over or actually directs the manner in which the investigator performs his or her duties.

Where the investigator is not subject to order, direction, or control by the client, he or she will be considered an independent contractor for whose acts a client generally has no liability. There are exceptions, however, when:

- the contract is for work that is illegal or necessitates illegality;
- the job carries inherent risk of danger to third parties;

- the client ratifies the investigator's conduct after the fact; or
- the client assists in commission of the tort or crime.

Nevertheless, taking steps to maintain the relationship as one of independent contractor may shield the hiring lawyer or client from liability for the investigator's acts.

Criminal Liability

A company or lawyer may be criminally liable for crimes committed by a private investigator in at least three ways: as a principal actor, as a co-conspirator, or as an aidor and abettor. Criminal liability will usually require that (1) the elements of the criminal statute can be proven; (2) the investigator was acting within the scope of his or her authority; and (3) the criminal conduct benefited the corporation.

Lawyers Who Retain Others Must Ensure that They Comply with the Ethics Rules

While HP's lawyers did seem concerned whether pretexting was legal, internal documents and emails released to date do not reflect much concern for whether the practice was ethical. You would think that one of the lawyers or executives at HP would have realized that what they were doing would not reflect well on the corporation if described in the national press. Under ABA Model Rule 5.3, a responsible lawyer must make reasonable efforts to ensure that a non-lawyer assistant's conduct is "compatible with the professional obligations of the lawyer." A lawyer cannot hire someone to do that which the lawyer himself could not do.

¹ See *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 115 (3d Cir. 2003)(exceptions in the Electronic Communications Privacy Act allow employers to freely search communication systems provided by the employer); 18 U.S.C. § 2511 (2006)(allowing monitoring with consent of employee).

² See, e.g., *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269 (Ct. App. 1973).

In addition, Model Rule 4.4 requires that, “in representing a client, a lawyer shall not use... methods of obtaining evidence that violate the rights of [a third person].”³ Lawyers can possibly face disciplinary actions for ordering or later ratifying unethical conduct or for failure to supervise and mitigate unethical acts.⁴

Are Communications Concerning an Investigation Privileged?

There is no specific privilege protecting communications between a lawyer and a private investigator. However, the attorney-client privilege may extend to communications between an attorney and its private investigator when the communication is necessary to assist the attorney in providing legal advice, and the other elements of the privilege are shown.

In addition, an investigator’s work-product may be protected if it is necessary to help an attorney prepare for litigation.⁵ Courts are more likely to protect an investigator’s work if the attorney directed the investigator’s work.

Tips for Hiring Investigators and Other Service Providers

The following tips may help lawyers and companies to avoid liability for the acts of investigators and other providers:

- Make sure the investigator is competent and licensed (if required). Check his or her references.

- Use a written retainer agreement that:
 - Explicitly defines the private investigator’s objectives and limitations;
 - Specifies that illegal/unethical activities are outside the scope of employment; and
 - States that the investigator is an independent contractor, not an agent.

(A model form developed by Kelley Drye is available from the author).

- Consider requiring an action plan from the provider so you know how he or she intends to accomplish the objective, weighing this against the likelihood that such knowledge will tend to support a finding that you controlled the provider.
- If you learn that a investigator has engaged in questionable conduct, express disapproval of the act and do not accept the benefits; do not ratify bad acts by turning a blind eye.
- Use care to preserve the attorney-client and work-product protections.
- Consider retaining the investigator or provider through outside counsel to further insulate the corporation.

³ While New York does not have a direct corresponding disciplinary rule, the results would likely be the same because of the general principle in the N.Y. Disciplinary Rules that lawyers are ultimately responsible for their employees.

⁴ See *Allen v. International Truck and Engine*, 02 CV-0902 (S.D. Ind. Sept. 6, 2006) (lawyers for defendant in discrimination suit violated ethics rules by directing investigators who posed as employees and contacted plaintiffs and potential class members).

⁵ *U.S. v. Nobles*, 422 U.S. 225, 238 (1975).