

Creative Snooping — How to Find Evidence in Creative Ways and Be Careful When You Snoop (Ethics) — How to Properly Hire and Ethically Use an Investigator and Gather Evidence Creatively

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When we "snoop" for evidence, we should be creative but avoid going too far. You may have read about famed celebrity private investigator Anthony Pellicano, who engaged in the wiretapping and illegal background checks of high profile litigants. Pellicano was charged with federal crimes along with one of the lawyers who had retained him and whose client enjoyed the fruits of Pellicano's criminal eavesdropping.

This outline will briefly describe the statutory laws, ethical rules, and case law applicable to the following creative investigative techniques:

- In-person pretexting;
- Pretexting via social media;
- Global Positioning System (GPS) tracking;
- Recording phone calls and taking video; and
- Computer snooping.

The outline will also address whether evidence obtained via one of these methods, in violation of legal or ethical rules, is subject to exclusion.

I. Can We Use "Pretexting" (i.e., Can We Pretend to Be Someone Else to Gather Evidence)?

[Answer: *Sometimes, but don't go too far*]

- A. What is Pretexting? Pretexting generally involves misrepresenting one's identity to another for the purpose of obtaining information.
- B. Examples:
 1. Posing as a customer and seeking to purchase goods to support an infringement claim.

2. Using a false identity and sending a "friend" request to an adverse witness on Facebook for the purpose of obtaining impeachment evidence.
 3. Impersonating a specific customer of a telephone service provider, insurance company, financial institution, or similar entities, to obtain records about the customer you are impersonating.
- C. Ethics Rules: Ethics rules that might apply to pretexting by lawyer or lawyer's agent:
1. SCR 20:4.1: Truthfulness in statements to others
 - In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact or law to a 3rd person; or (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by SCR 20:1.6.
 - Notwithstanding par. (a), SCR 20:5.3(c)(1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities.
 2. Wisconsin Committee Comment on SCR 20:4.1(b)
 - Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See SCR 20:1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See SCR 20:8.4(c). Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception.
 - Lawful investigative activity may involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

3. SCR 20:8.4: Misconduct

- It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . [or] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

4. SCR 20:5.3(c)(1): Responsibilities regarding nonlawyer assistants

- With respect to a nonlawyer employed or retained by or associated with a lawyer: a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

5. SCR 20:4.2: Communication with person represented by counsel.

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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.

6. Note that ethical principles might *require* a lawyer to engage in pretexting when necessary to fulfill obligation to zealously represent client. In criminal defense context, Sixth Amendment right to effective assistance of counsel might require use of pretexting. See *Office of Lawyer Regulation v. Hurley*, No. 2007AP478-D (Wis. Feb. 11, 2009) (unpublished).

D. Pretexting and Criminal Laws. Some forms of pretexting violate criminal laws. Examples:

1. Telephone Records and Privacy Protection Act of 2006. 18 U.S.C. § 1039. Criminal penalties for using false identity to obtain customer's phone records from phone company.
2. Gramm-Leach-Bliley Act. 15 U.S.C. § 6801 *et seq.* Criminal penalties for obtaining customer information from financial institutions through use of false pretenses.

E. Wisconsin cases:

1. *Office of Lawyer Regulation v. Hurley.*

- Defense lawyer in a criminal matter hired private investigator to obtain the alleged victim's computer using deceit. Investigator sent a letter approved by the lawyer that offered a free computer to the alleged victim in exchange for his current computer. The stated false purpose of the exchange was to research computer usage preferences of students and young adults.
- One issue in the underlying criminal case was whether the defendant possessed child pornography and whether the defendant showed the child pornography to the alleged victim. Defense lawyer believed the alleged victim was framing the defendant, and that, the alleged victim's computer would contain exculpatory evidence.
- The OLR claimed a violation of prior SCR 20:4.1 and 8.4(c). The referee recommended, and the Supreme Court ordered, that the OLR failed to establish the violation of any ethical rule, and noted that the OLR did not contend that defense lawyer's conduct would violate the current version of SCR 20:4.1.
- Specifically, the referee found that the misrepresentation was not material, as defined in prior civil cases dealing with evidence. On this basis, the referee found no violation of SCR 20:4.1. The referee further elaborated that the special nuances of this particular case, and criminal defense, warranted the findings.

2. *In re Disciplinary Proceedings Against Wood*, 190 Wis. 2d 502, 526 N.W.2d 513 (1995).

- Lawyer hired private investigator to obtain copy of declaration page of insurance policy. Investigator telephoned insurer and pretended to be the insured. At

investigator's request, insurer faxed declaration page to lawyer.

- When lawyer hired investigator to obtain declaration page, lawyer knew that only way investigator could do so was through use of dishonest means.
- Lawyer was found to have violated Rule 20:8.4(c) by engaging in conduct involving dishonesty.

F. Cases from other jurisdictions:

1. *In re Crossan*, 880 N.E.2d 352 (Mass. 2008). Attorney's participation in sham interview of judge's former law clerk, as part of an investigation into judge's alleged bias against his client, violated the disciplinary rules.
2. *In re Paulter*, 47 P.3d 1175 (Colo. 2002). Deputy district attorney violated ethics rules by impersonating public defender in order to induce criminal suspect to surrender.
3. *In re Conduct of Gatti*, 8 P.3d 966 (Or. 2000). Attorney's intentionally misrepresenting his identity to employees of medical-records review company and making false statements to employees warranted public reprimand.
4. *Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003). In franchise litigation, attorneys hired investigator to pose as franchisee's customer. Investigator entered store and tape recorded conversations he had with employees represented by counsel. Court determines that investigator's conduct would be imputed to lawyers and that conduct violated Rule 8.4(c) (conduct involving dishonesty) and Rule 4.2 (communication with person represented by counsel).
5. *Gidatex S.r.L. v. Companiello Imports Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999). Furniture manufacturer sued terminated distributor for trademark infringement. District court finds that attorney's use of private investigators to secretly tape conversations with defendant's salespeople did not violate New York disciplinary rules against attorney misrepresentations and contact with represented parties.
6. *Apple Corps v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (D.N.J. 1998). To investigate possible infringement, lawyer and

investigators could pose as customers of alleged infringer, speak with sales people, and purchase infringing merchandise.

II. Can We Use "Pretexting" to Gather Information from Social Media Websites?

[Answer: Probably not.]

- A. What is Pretexting in Connection with Social Media? Pretexting via social media involves conduct, such as trying to "friend" a witness on Facebook by pretending to be a high-school classmate.
- B. Applicable Rules. The same ethics rules and laws that apply to in-person pretexting apply to social media pretexting.
- C. The Test. Such conduct is judged on a continuum.
1. At one end, it is almost certainly ethical for a lawyer to send a request that contains only truthful information and discloses that the purpose for making the request is to gain information for use in litigation. This would not even be classified as pretexting. (But note that ethical concerns arise if the person might be represented by counsel, SCR 20:4.2.)
 2. At the other end, it is almost certainly unethical for a lawyer to use misrepresentations, such as pretending to be a classmate, to gain access to password-protected information.
 3. The gray area is where the lawyer uses an investigator or other third party and no active misrepresentations are made, but the investigator or third party does not disclose that he is collecting information for use in litigation. See Michael Downey, *Scruples: Pretexting and Discovery of Social Media*, Litig., Winter 2012 at 64.
- D. Ethics opinions:
1. San Diego County Bar Legal Ethics Op. 2011-2 (May 24, 2011): "We believe that the attorney . . . violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not."
 2. Philadelphia Bar Association Professional Guidance Committee Opinion 2009-2 (March 2009). Opines that the following proposed conduct would be unethical: Lawyer proposes to ask a third

person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to "friend" her, to obtain access to the information on the pages. The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the lawyer who would evaluate it for possible use in the litigation.

3. New York City Bar Association Committee on Professional Ethics Formal Opinion 2010-2 (Sept. 2010): A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

III. Can We Gather Evidence Using GPS Tracking Devices?

[Answer: Maybe in some civil cases, but in most criminal cases you need a search warrant]

A. Guidance from Recent Supreme Court Case: *United States v. Jones*, 132 S. Ct. 945 (2012).

1. Last year, the United States Supreme Court held that the attaching a GPS tracking device to a vehicle and using it to track the vehicle's movement on public streets was a search under the Fourth Amendment.
2. Notably, the Court did not address whether the defendant had a reasonable expectation of privacy but instead based its decision on a property-based approach tied to common law trespass.
3. *Jones* is squarely a Fourth Amendment case, with the Government a necessary party. But what about the use of GPS tracking in suits between private litigants?

B. The Impact of *Jones* on Suits Between Private Parties.

1. In Wisconsin, pre-*Jones*, it was generally believed that (i) you could always track your own movements; (ii) tracking third parties, or their property, without their knowledge is probably inadmissible, if not illegal, unless done by law enforcement; and (iii) you could usually track your own property, especially if you notify other passengers David A. Schumann, *Tracking Evidence with GPS Technology*, Wis. Law., May 2004.

2. Beyond Wisconsin, and before *Jones*, courts also did generally allow private parties—such as spouses and employers—to track their own property without first informing the user or driver.

- For example, in a 2011 New Jersey case, a woman hired a private investigator to investigate her husband's suspected infidelities. At the investigator's suggestion, the woman placed a GPS device on one of the family's vehicles often driven by the husband but jointly owned by the husband and wife together. When the husband discovered the device, he sued both his wife and the investigator for invasion of privacy. The court granted summary judgment against the husband and, on appeal, the appellate court affirmed and held that "the placement of a GPS device in plaintiff's vehicle without his knowledge, but in the absence of evidence that he drove the vehicle into a private or secluded location that was out of public view and in which he had a legitimate expectation of privacy, does not constitute the tort of invasion of privacy." (See *Villanova v. Innovative Investigations, Inc.*, 21 A.3d 650 (N.J. Super Ct. App. Div 2011))
- Similarly, a 2005 federal case in Missouri involved an employee's claim against his employer relating to the employer's installation of a GPS tracking device on the company vehicle that employee was assigned to drive. The district court ultimately granted summary judgment in the employer's favor, and in so doing found that "[u]se of the tracking device on defendant's company car, even though it was assigned to plaintiff, does not constitute a substantial intrusion upon plaintiff's seclusion, as it revealed no more than highly public information as to the van's location. Especially because the van was the property of defendant, defendant's use of the tracking device on its own vehicle does not rise to the level of being highly offensive to a reasonable person." (See *Elgin v. St. Louis Coca-Cola Bottling Co.*, No. 4:0 SCV 970-DJS, 2005 WL 3050633 (E.D. MO. Nov. 14, 2005).

3. Although both of these cases remain good law in their respective jurisdictions, it's unclear how they would have been decided today given the concerns raised by Justice Scalia in *Jones*. One court has already applied *Jones* in the private party context:

- In a 2012 federal case in Washington, a putative class of consumers brought suit against a smartphone manufacturer and application company alleging that the weather

applications on certain smartphones turned the phones into "surreptitious tracking devices." The plaintiffs claimed violations of the California Constitution's right to privacy, and defendants moved to dismiss. Relying in part on Justice Sotomayor's concurrence in *Jones*, and its treatment and description of GPS technology ("...GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about familial, political, professional, religious and sexual associations."), the Court found that the plaintiffs had sufficiently pled an invasion of privacy and allowed the claim to go forward. (See *Goodman v. HTC America, Inc.*, No. C11-179 3MJP. 2012 WL 2412070 (W.D. Wash. June 26, 2012).

C. Possible Statutory Limitations on Obtaining GPS Evidence in Wisconsin.

1. Privacy. Wisconsin does have a privacy statute and it defines an "invasion of privacy" as an intrusion "in a place that a reasonable person would consider private or in a manner which is actionable for trespass." Collecting GPS in public places—such as open roads—may or may not violate the statute. See Wis. Stat. § 995.50(2)(a) (Wisconsin's Privacy Statute)
2. Stalking. Wisconsin's stalking statute lists monitoring the activities of a person by "electronic means" amongst its prohibited courses of conduct. However, this statute also requires a showing that the actor's conduct would cause a reasonable person fear of bodily injury or to suffer serious emotional distress. See Wis. Stat. § 940.32 (Stalking).
3. Wiretapping. Although Wisconsin has a statute criminalizing certain wiretapping activity, section 968.27(4)(d) expressly excludes "[a]ny communication from a tracking device" from the definition of "electronic communication"—a necessary element of Wisconsin's wiretapping statute. See Wis. Stat. § 968.31 (Interception and disclosure of wire, electronic, or oral communications prohibited).

D. The Admissibility of GPS Evidence – Recent Lessons from *U.S. v. Brooks*, 715 F.3d 1069 (8th Cir. 2013).

1. The Brooks Case. In May of 2011, Brooks entered a credit union in Des Moines, Iowa, and handed the teller a note stating that he had a gun and that she was to put money in an envelope. The teller complied, but also included a GPS tracking device in a stack of twenty-dollar bills. The device self-activated, and the credit union's security company used it to track Brooks to a location only a few

miles from the robbery. Brooks was eventually arrested, and the GPS device found in his getaway vehicle.

2. GPS Evidence Permitted. On appeal, Brooks challenged the admission of the GPS evidence at trial on various grounds, all of which the Eighth Circuit rejected. But the Court's treatment of Brooks' claims provides some interesting lessons for those wishing to obtain and offer GPS evidence:
3. GPS Evidence Is Reliable. Despite Brooks' claim to the contrary, the district court took judicial notice of GPS's reliability, and found that there was no need for testimony on the underlying technology. The appellate court noted that "[c]ommercial GPS units are widely available," and that courts "have addressed the use of GPS technology for more than a decade."
4. GPS Evidence May Be Presented With Lay Foundation. In *Brooks*, the Government called the credit union's security consultant—a lay witness—to provide the necessary foundation for admission. The court held that this lay testimony, coupled with other corroborating evidence, provided sufficient foundation.
5. GPS Evidence May Not Be Hearsay. The district and appeals courts concluded that the GPS evidence may fall within the business records exception. Here, the credit union's security consultant testified that when one of its customers activates such a device, the consultant's company regularly keeps the GPS data on its servers.
6. Finally, For Our Criminal Law Colleagues, GPS Evidence May Not Violate the Confrontation Clause. The Court found that "the GPS reports were not created to establish some fact at trial. Instead, the GPS evidence was generated by the credit union's security company for the purpose of locating a robber and recovering stolen money. Therefore, the GPS reports were non-testimonial, and their admission did not violate Brooks's Confrontation Clause rights."

IV. Can We Gather Evidence By Recording Phone Calls or Videotaping Others?

[Answer: Sometimes if we are a party to the phone call, and maybe for videotaping if we are not audiotaping, lipreading, or otherwise violating privacy rights]

- A. The Federal "Wiretap Act." It is a violation of federal law to intercept the communications of others. Following *Katz v. United States*, 389 U.S. 347 (1967), Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (the "Wiretap Act"). Christopher Brett Jaeger & Gregory D.

Smith, *Computer and Electronic Snooping: Opportunities to Violate State and Federal Law*, 34 Am J. Trial Advoc. 473, 480 (2011).

1. Wiretap Act: It is a crime to "intentionally *intercept*[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication..." 18 U.S.C. § 2511(1)(a) (emphasis added).
2. The "One Party" Exception: It is not unlawful for a person to intercept a communication "where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c).

B. State Wiretap Laws. Almost every state has enacted statutes prohibiting wiretapping. (Jaeger & Smith, *supra* at 481).

1. The majority of states, including Wisconsin, follow the lead of the federal statute and excuse liability where one party to the communication consents. (Jaeger & Smith, *supra* at 481.) But some states impose liability even when one party to the communication consents, so check applicable state law.
2. Wis. Stat. § 968.31: An individual who is a party to either an in-person conversation or electronic communication, or who has the consent of one of the parties to the communication, can lawfully record it or disclose its contents, unless the person is doing so for the purpose of committing a criminal or tortious act. See <http://www.rcfp.org/reporters-recording-guide/state-state-guide/wisconsin>.
3. At least one court (Tennessee) has found that a parent can consent on behalf of a minor child, so a call between the child and another adult could be recorded without violation of the law. (Jaeger & Smith, *supra* at 491.)

C. Ethical rules apply as well.

1. The ABA has opined that *legal* secret recording is not unethical, provided there are no false representations about whether the conversation is being recorded. Gerald B. Lefcourt, *Fighting Fire with Fire: Private Attorneys Using the Same Investigative Techniques as Government Attorneys: The Ethical and Legal Considerations for Attorneys Conduction Investigations*, 36 Hofstra L. Rev. 397, 407-08 (2007).
2. Attorney ethical rules generally apply with equal force when the conduct is merely supervised by an attorney. David B. Parker &

Pierre B. Pine, *The Pellican's Mess: Ethical Considerations for Attorneys Who Hire Private Investigators in the Wake of Pellicano*, 5 (Aug. 2006).

- D. Pellicano (2006): Attorney Christensen was convicted for hiring Pellicano ("investigator to the stars") to wiretap the ex-wife of MGM owner, Kirk Kerkorian. (Jaeger & Smith, *supra* at 473-75.) Pellicano may not have specifically told Christensen that he used an illegal wiretap, but it was determined that Christensen knew or should have known that Pellicano gathered the evidence this way.
- E. Video surveillance: There is no legal or ethical prohibition on secretly videotaping or photographing a witness, provided that no trespass is involved. (Lefcourt, *supra* at 410-11). Robert W. Sacoff, *The Ethics of Deception: Pretext Investigations in Trademark Cases*, 8 (Apr. 1, 2010).
 - 1. But videotaping that includes audio recording is subject to Wiretap Act. (Lefcourt at 411 n.55.)
 - 2. *State v. Diaz*, 706 A.2d 264 (N.J. Super Ct. App. Div. 1998): A leading "nanny cam" case where court found that: (1) NJ wiretap act (similar to federal) did not apply to recorded silent video surveillance; and (2) audio portion of defendant's statements to infant was admissible because of parental consent on behalf of minor child to intercept communications.
 - 3. But at least one "investigator guide" has suggested that using a video to 'lip read' constitutes the interception of oral communications of others and may violate wiretap laws.

V. Can We Conduct "Computer Snooping"?

[Answer: We can do look in places and computers that are not private, but watch out if you don't have authorization to view private communications.]

- A. Federal Laws. In 1986, Congress passed the Electronic Communications Privacy Act, which amended the Wiretap Act to extend restrictions on wiretaps from telephone calls to the transmissions of electronic data by computer. At that time, Congress also passed the Stored Communications Act ("SCA"), which forbids unauthorized access to stored wire and electronic communications. (Jaeger & Smith, *supra* at 482-83; see also Charles Doyle, Cong. Research Serv., R41733, Privacy: An Overview of the Electronic Communications Privacy Act (2012).
 - 1. Stored Communications Act: It is a crime to "(1) intentionally access[] *without authorization* a facility through which an electronic communication service is provided; or (2) intentionally exceed[] an

authorization to access that facility; and thereby obtain[], alter[], or prevent[] authorized access to a wire or electronic communication while it is in *electronic storage* in such system." 18 U.S.C. § 2701(a) (emphasis added).

2. "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2711 (referencing 18 U.S.C. § 2510).

- This definition is not easily applied. See, e.g., *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp. 2d 914, 925-26 (W.D. Wis. 2002) (distinguishing *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001)).

3. "Authorization" is not defined in the SCA, but courts have found *access* and *password protection* to be relevant factors. (Jaeger & Smith, *supra* at 499-515.)

- For example, where spouses have full access to a computer and nothing is password protected, a spouse who accesses files or e-mails probably does not violate the SCA. (Jaeger & Smith at 500.)

B. How the Laws Relate. Federal courts have held that violations of the Wiretap Act and the SCA are mutually exclusive. The Wiretap Act refers to "interception," which encompasses only "acquisitions contemporaneous with transmission." (Jaeger & Smith, *supra* at 493.)

C. Spyware: Courts have applied the Wiretap Act because spyware records electronic communications as they are being transmitted. (Jaeger & Smith at 496-98.)

D. State Laws: Many states have enacted similar laws outlawing the interception of wire, oral and electronic communications. (See Doyle, *supra* at 81 (listing state laws).)

E. Ethical considerations: Use of computer software applications to surreptitiously examine and trace email and other electronic documents may violate Model Rule 8.4(c) (SCR 20:8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. (Lefcourt, *supra* at 414.)

VI. Is Illegally Obtained Evidence Always Excluded?

[Answer: Not always.]

- A. Illegally Obtained Evidence is Sometimes Expressly Excluded By Statute or Constitutional Considerations.
1. GPS Tracking
 - In criminal cases, GPS tracks obtained without a warrant may be inadmissible because of constitutional privacy considerations in some states. See *State v. Jackson*, 76 P.3d 217 (Wash. 2003) (holding that attachment of a GPS device to a vehicle without a warrant violates state constitutional provision that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law"); See also Schumann, *supra*.
 2. Recorded Phone Calls (Wiretapping)
 - Generally, illegally intercepted audio tapes of a telephone conversation are inadmissible under the Federal Wiretap Act. 18 U.S.C. § 2515 ("Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.").
 - However, they may be admissible for the limited purpose of impeaching testimony. See *Johnson v. Johnson*, No. M2000-00358-COA-R3CV 2001 Tenn. App. LEXIS 639, at *10, 14-16 (Tenn. Ct. App. Aug. 28, 2001). (Jaeger & Smith at 489-90.)
 - Intent to record all conversations, without specific intent to record the conversation sought to be admitted, does *not* render that conversation unintentionally intercepted. All recorded conversations would be generally inadmissible. See *McDaniel v. McDaniel*, No. E2009-00447-COA-R3-CV 2010 Tenn. App. LEXIS 362, at 14-15 (Tenn. Ct. App. May 27, 2010). (Jaeger & Smith, *supra* at 490-91.)

3. Computer Snooping

- The Stored Communication Act does not have a provision like the Federal Wiretap Act that prohibits information obtained in violation of the Act from being disclosed or admitted into evidence. (Jaeger & Smith, *supra* at 512.)
- However, even electronic communications obtained in violation of the Wiretap Act may be admissible (although most electronic communications are obtained from storage as opposed to intercepted during their split-second transmission.) The suppression provision of the Wiretap Act applies only to wire or oral communications, not to electronic communications. Nonetheless, courts often exclude the evidence where the Wiretap Act has been violated. (Jaeger & Smith, *supra* at 494-95, 512-13.)

B. Courts Have the Discretion to Exclude Evidence Obtained in Violation of Ethical Rules.

1. Although ethics violations are handled primarily through the attorney disciplinary system, courts have the discretion to exclude evidence obtain in violation of the rules of ethics. Erica M. Landsberg, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. Chi. L. Rev. 1399, 1411 (1986); *see also* Sacoff, *supra* at 5-10 (summarizing cases involving motions to exclude evidence).
2. Cases excluding evidence obtained in violation of rules of ethics.

In *Midwest Motor Sports v. Artic Sales, Inc.*, a dealership-termination case, the district court sanctioned the defendant manufacturer's attorneys – who had hired a private investigator to visit the plaintiff dealer to surreptitiously record conversations with the dealer's employees – for unethically tape recording parties represented by opposing counsel. Specifically, the district court excluded from evidence the tape recordings taken by the investigator, as well as any evidence obtained as a result of the recordings. The parties then settled the case before trial but reserved the question of whether additional sanctions should be imposed. The district court entered a written order denying further sanctions and explaining in detail the basis for its exclusionary order. The Eight Circuit affirmed the imposition of the evidentiary sanctions but declined to hold that monetary sanctions should have been imposed as well.

In *Trans-Cold Express, Inc. v. Arrow Motor Transit, Inc.*, a truck accident case, the Seventh Circuit affirmed the district court's decision to exclude evidence that had been deceptively obtained by the defendant's private investigator. The Court of Appeals reasoned that "the desirability of deterring improper investigative conduct was a factor which the court could properly consider in the exercise of its discretion to exclude evidence." 440 F.2d 1216, 1219 (7th Cir. 1971).

In *Bruske v. Arnold*, 254 N.E.2d 453 (Ill. 1969), the Illinois Supreme Court affirmed the exclusion of a statement given by the defendant to a private investigator hired by the plaintiff's attorney, where the plaintiff knew that the defendant had retained counsel.

See also *Landsberg*, *supra* at 1413-16; *Parker & Pine* at 12 (discussing cases).

3. Case admitting evidence obtained in violation of rules of ethics.

In *Stagg v. New York City Health & Hospitals Corp.*, 595, 556 N.Y.S.2d 779 (App.Div. 1990), the court allowed testimony allegedly obtained in violation of the ethical rule against communicating with a person represented by counsel. The court held that "even if the matters to which the investigator testified were unethically obtained, they nevertheless would be admissible at trial. New York follows the common law rule that the admissibility of evidence is not affected by the means through which it is obtained. Hence, absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence . . . , such evidence will be admissible even if procured by unethical or unlawful means." *Stagg*, 556 N.Y.S.2d at 780; see also *U.S. v. Parker*, 165 F. Supp. 2d 431, 477 (W.D.N.Y. 2001) (stating that even if attorney misconduct is deemed an ethical violation, "such does not warrant use of the exclusionary rule as a remedy for such violation").

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Wisconsin Supreme Court Rules

SCR 20:1.2(d) Scope of representation and allocation of authority between lawyer and client

SCR 20:1.6 Confidentiality

SCR 20:4.1: Truthfulness in statements to others.

SCR 20:4.1(b)

SCR 20:4.2: Communication with person represented by counsel.

SCR 20:5.3(c)(1): Responsibilities regarding nonlawyer assistants.

SCR 20:8.4: Misconduct

SCR 20:8.4(c)

U.S. Code sections

15 U.S.C. § 6801: Gramm-Leach-Bliley Act.

18 U.S.C. § 1039: Telephone Records and Privacy Protection Act of 2006.

18 U.S.C. § 2510 Wire & Electronic Communications & Interception of Oral Communications, Definitions

18 U.S.C. § 2511(2)(c) Interception and disclosure of wire, oral, or electronic communications prohibited

18 U.S.C. § 2511(1)(a) Interception and disclosure of wire, oral, or electronic communications prohibited

18 U.S.C. § 2515: Federal Wiretap Act (amended by Electronic Communications Privacy Act).

18 U.S.C. § 2701(a): Stored Communications Act.

18 U.S.C. § 2711 Stored Wire and Electronic Communications and Transactional Records Access, Definitions for Chapter

Wisconsin Statutes

Wis. Stat. § 995.50(2)(a)

Wis. Stat. § 940.32

Wis. Stat. § 968.27(4)(d)

Wis. Stat. § 968.31

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The Do's and Don'ts of Hiring a Private Investigator

“So you're a private detective. I didn't know they existed, except in books, or else they were greasy little men snooping around hotel corridors.” *The Big Sleep*

Do:

Get a Recommendation

Private investigators (like lawyers) come in all shapes and sizes. Make sure that you get a recommendation from someone you trust. Go with the known commodity.

“Don't be too sure I'm as crooked as I'm supposed to be.”
Sam Spade

Trust but Verify

Despite getting a recommendation, you still want to do your own checking into the background of the investigator.

“You don't have to trust me as long as you can persuade me to trust you.” *Sam Spade*

Physically Meet with the Investigator

Once you get the recommendation and clear any background issues, meet the private investigator in person before you hire him/her. Your private investigator always has the potential to be a witness, and the only way to judge their ability as a witness is to meet them in person.

Consider Written Instructions

Written instructions can protect you against claims that you authorized the “Don'ts” below. But, remember that written instructions may be discoverable, so ensure that you do not disclose your litigation strategy, or attorney-client communications.

Go Slow

Take baby steps with gathering information. Start with your own Google searches before hiring a PI to do the same. Consider having the target followed before videotaping their actions. Remember, that videotape may be discoverable, even if the actions of the target are in fact harmful to your case.

Don't:

Communicate with a Represented Party

Make sure to instruct your PI to not communicate with a represented party when you yourself are prohibited from doing so.

"In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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." SCR 20:4.2

Reveal Confidential Client Information

Make sure your PI is instructed on what they can, and cannot, say or do to ensure that they do not reveal your client's confidential information.

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c)."
SCR 20:1.6(a)

Make Extrajudicial Statements That May Prejudice an Adjudicative Proceeding

Ensure that any statements your PI makes would not run afoul of using public communication to affect a lawsuit.

"A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." SCR 20:3.6(a)

Suppress Evidence

Specifically instruct your PI not to do anything that would suppress evidence in a matter.

"A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not

counsel or assist another person to do any such act.”
SCR 20:3.4(a)

Advise a Witness to Hide Him or Herself

“A lawyer shall not: (f) request a person other than a client to refrain from voluntarily giving relevant information to another party...”
SCR 20:3.4(f)

Pay or Offer to Pay Compensation to a Witness Contingent on the Testimony

“A lawyer shall not: (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” SCR 20:3.4(b)

** Thanks to Eric J. Van Schyndle and John A. Rothstein, for preparing this list.

Creative Ways to Find Assets

Always start with a search for information about your subject. Learn as much as you can about their interests, hobbies, favorite activities, collections, etc. Most people have special activities they like to engage in or things they admire, collect or enjoy. Once you figure out your target's interests, it is easier to develop an asset search plan.

The techniques you use to find assets will differ depending on whether you are in the midst of litigation or not. The proper use of subpoenas and other discovery tools makes it much easier to force disclosure than in a non-litigation context.

The following is a list of ten ways to find assets:

1. **The Ex-Factor**. The "ex-factor" is one of the most productive methods of finding assets. By "ex" we are referring to an ex-spouse, ex-business partner, ex-employee, ex-confidant, etc. Even blood relatives can sometimes decide to "spill the beans" on their kin. Their information is usually very accurate. However, they also usually have an agenda or ulterior motive for providing the information. Always beware that while information from the ex-factor may be accurate, it may not be the "whole picture." Use information from the ex-factor as a guide for further discovery. Take it with a grain of salt.
2. **Google / Social Media**. An internet search is easy, convenient and cost effective, and therefore should be one of the first methods you use to discover assets. Your search will undoubtedly retrieve a lot of information, which must then be sorted through. Although you will not usually find actual evidence of assets from an Internet search, you may get clues on where to focus your search. With this in mind, consider the meaning behind your search results. For example, if your search reveals your target is connected to a "classic car club," there is a good chance your target owns a classic car. Similarly, membership in a rare-breed dog club reflects probable ownership of a valuable dog. Social media sites, such as Facebook, may also give you clues to asset ownership. For example, a picture of the target proudly riding a Harley Davidson Motorcycle in a parade suggests the target may own a motorcycle.
3. **Commercial Asset Search Programs**. Here we are referring to Lexis, Westlaw and other commercial asset search programs. Depending on your level of permissible use, these programs are a great way to survey your target on a nationwide basis. The programs can detect a wide spectrum of asset information, including name variations, prior addresses, real estate ownership, licenses, motor vehicles, criminal records, neighbors and relatives, bankruptcy cases and other litigation. Use results from these programs to guide your discovery; they do not generate documents that can be used as evidence.

4. **Wisconsin Dept. of Financial Institutions - Corporate Records Search and UCC Filing Search.** The DFI website allows you to search your target's name for connections to corporations as well as UCC filings. While the information from these sites is limited, the corporate records search can at least tie your target to a particular business. This is an easy search and can uncover previously unknown associations. (Tip: After searching your target's name, click on "advanced search" and search your target's name in the registered agent section.)
5. **CCAP, CM/ECF, Bankruptcy and Other Case Docket Information.** Documents contained in civil case files can be very illuminating concerning a target's assets, particularly when the case involved contested litigation. Don't forget to consider calling the attorney for the other side to inquire about what they learned in the case about assets. They can often give you information that is not clearly evident from the file. Be sure to check every target for a previous bankruptcy case, not only to make sure your debt was not discharged, but also for information contained in the file. Even an old set of bankruptcy schedules can be revealing about the target's assets and interests. A standard set of bankruptcy schedules includes a complete listing of real and personal property owned at the time bankruptcy was filed. There may be other records available as well.
6. **Real Estate Ownership and Tax Records.** County and local real estate ownership and tax records available online can be a way to discover real estate owned by your target. Unfortunately, many of these websites do not permit a search by name, so you need some intelligence on which properties to search. In litigation, be sure to subpoena the HUD-1 documents for all real estate transactions undertaken by your target during the relevant time period. The HUD-1 is signed by the parties and contains a lot of valuable information, including sales price, names of buyer and seller and details concerning the disbursement of the sales proceeds.
7. **Insurance Policy Records.** Make sure you subpoena copies of all insurance policies, particularly riders for special assets such as jewelry.
8. **Licenses.** Be on the look-out for special licenses held by your target. A pilot's license may suggest the target has an interest in an airplane. A real estate broker's license or a license to practice medicine or law also opens opportunities for inquiry about sources of income.
9. **Addictions.** The knowledge that your target has some kind of addiction, such as a gambling addiction, can help you understand where assets are being spent

or hidden. Casino accounts are one of those unexpected places where a target can hide money. Of course, a gambling addiction may also provide understanding as to why all of the target's income has not been converted into assets. We once had a lady who had an addiction to beanie babies. She had two entire warehouses full of beanie babies (new, unopened boxes) that she failed to disclose in her bankruptcy case. She was turned in by an "ex-factor" and her beanie babies were ultimately sold to repay creditors.

10. **Financial Account Information.** Consider a subpoena of bank account information (including PayPal accounts) as well as credit card accounts. A review of the transactional information on these accounts can give you a clue as to where the target is spending money as well as the sources of new money. Rent from an undisclosed rental unit may show up as regular deposits in the bank account. Similarly, monthly payments for rental of a storage shed may reveal another place where assets might be stored. This is usually a labor-intensive review, but it can reveal many avenues for questions and further discovery.

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Parisheld June Nov 13 2013

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