

## Pretexting -- Not a Good Idea And Other Lessons from the Hewlett Packard Debacle

**Graydon  
 Head &  
 Ritchey  
 LLP**

By John C. Greiner and Joseph E. La Rue, Graydon, Head & Ritchey, LLP

The Hewlett-Packard ("HP") board leak investigation has dominated business news lately, from coverage of the charges against the key players to reporting on Congressional efforts to criminalize "pretexting." However, one aspect of the unfolding drama has not been discussed much, and that has to do with the lessons the leaders of business and industry should draw from this story. This article will help fill that void by briefly reviewing what happened at HP, why it was wrong, and then suggest steps business leaders in Greater Cincinnati can take to avoid similar pitfalls.

The HP scandal began in early 2005 when HP Chairman Patricia Dunn decided to investigate a boardroom leak of confidential company information from the boardroom to the media. She hired an outside investigative firm to conduct the investigation. Among the methods employed to investigate the leak was the controversial technique known as "pretexting," in which investigators called the phone company and posed as HP board members and the journalists who had reported the leaked information. Using the names and social security numbers of these

board members and journalists, the investigators were able to gain access to the personal phone records of their targets. A simple cross-referencing of the records revealed which board member had been speaking to the journalists. While this technique solved the mystery, it also arguably violated the law. The State of California has filed criminal charges against Chairman Dunn and four other defendants.



Greiner



LaRue

The interesting question that arises from the California charges is whether, under California law, "pretexting" is even illegal. Legal scholars currently are debating the point. That debate, however, would not occur in the Buckeye State.

Ohio is one of the few states in which pretexting is clearly illegal. The Ohio Revised Code makes it a felony to use the personal information of another person to pretend to be that person. However, the federal government does not have a specific law against pretexting, and most states (including Kentucky) only make it a crime when the pretexter uses the other person's identity to defraud him or her of money or property.

Of course, whether or not criminal

statutes expressly prohibit the practice, something about "pretexting" makes people uneasy. As Rep. Joe Barton, the chairman of the House Energy and Commerce Committee, said, "In plain language, it's pretending to be somebody you're not, to get something you probably shouldn't have, to use in a way that's probably wrong."

HP Chairman Dunn and other executives involved in the decision-making process were advised by legal experts that while pretexting walked the line between legality and illegality, it was probably legal. On that basis, they decided to go forward. Because Ohio expressly criminalizes pretexting, local business leaders would not be stuck in the gray area in which Dunn found herself.

But what should one do when faced with Dunn's choice? Consider the following ethical dilemmas that could be faced by company directors. Should the Chair tell the board it is being investigated? In other words, is there an obligation to the innocent board members to let them know they are under an investigation? What direction should a business give to outside investigators (or others that it contracts with, even if not in an investigative context)? HP officials claim that they told their investigators not to do anything illegal. Is that enough? Or, should a company explicitly state what

is acceptable, as well as unacceptable, behavior? Should the focus be on the results the firm can produce, the methods it will use to produce the results, or on a combination of these considerations? What should business people do when they discover that their company is engaging in unethical—and potentially illegal—behavior? Numerous decision makers at HP chose to look the other way as the investigation occurred. One exchange in particular is informative. A senior lawyer at HP asked the manager of global investigations whether he was comfortable with pretexting. The manager answered, "I think it is on the edge, but above board," to which the lawyer responded, "I shouldn't have asked." That lawyer's name is Kevin Hunsaker, now a defendant in the criminal case.

We can probably assume that when Dunn decided to investigate the HP leak, she did not set out to break the law. She most likely did not think she was making a decision which would ultimately bring about the end of her career with HP and a possible prison sentence. However, as we learn as young children, our actions have consequences. Well-intentioned business decisions—if not kept clearly within the bounds of the law, and away from the outer fringes—can lead to disastrous costs for the business and the decision makers.