

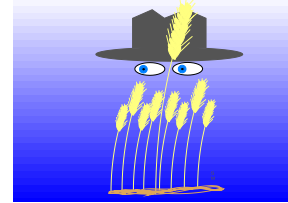
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Pretexting: An Examination of the Legal and Ethical Limits; Part I

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Recently, the media has been filled with varied reports concerning the use of pretexting which is usually presented in a negative light and frequently portrayed as just a form of lying. These incidents and reports have led to legislative activity, civil actions and even criminal charges in one case. A discussion on the use of databases at a recent continuing education event touched on the topic and created varied comments among the attendees. It seems to be appropriate to examine this subject in more detail to define the term 'pretexting', the issues surrounding its use and the actual legal and ethical limits. I shall start by examining the definitions of the term.

Merriam-Webster Online Dictionary: "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs."

Wikipedia: "A pretext is something which is put forward for the purpose of misdirection. Pretexts can take several forms, and be used for many reasons from simple pretense to pure deception."

The key point in these common definitions is the attempt or intent to misdirect or disguise the actual purpose. Notice that when these definitions are applied to private detectives, misdirection requires an active rather than a passive investigative activity; it assumes contact with people rather than simple observation of people. This is an important distinction as will become clear in applying the legal standards. The Graham-Leach-Bliley Act, for example, applies the active form in its legal restrictions on access to personal information held by financial institutions essentially defining pretext as: "... making a false, fictitious, or fraudulent statement or representation ..." to either the bank or the customer (15 USC 6821). Disguise, on the other hand, implies passive investigative actions which are usually performed in a manner intended to avoid drawing attention to the investigator. Sometimes an actual disguise is used, but most of the time the private detective simply strives to appear to be just one more citizen at that place and time rather than appearing to be an investigator. That is the basic purpose for plainclothes rather than uniformed investigations. In that regard, all plainclothes work could be labeled 'pretext', but usually isn't. Most people understand that basic differentiation, and accept it.

The second step is to recognize that where pretext is used, it has two basic forms which are addressed in legal restrictions. The first is the false personation; the second is the false pretense or representation. West's Encyclopedia of American Law, 1998 defines them and

comments on them as follows:

False personation: The crime of falsely assuming the identity of another to gain a benefit or avoid an expense.

False pretense: False representations of material past or present facts, known by the wrongdoer to be false, made with the intent to defraud a victim into passing title in property to the wrongdoer. A false representation can be a verbal, written or implied statement. If a statement suggests that the wrongdoer has the authority, power or ability to perform what is represented, but the wrongdoer does not have that authority, power or ability, the implication is a false representation.

With this in mind, an examination of Federal codes that directly limit the use of pretexting by private detectives will focus on those that address false personation and those that address false pretense.

Federal Codes. These federal codes are the principal ones cited or considered to limit pretexting:

- **18 USC 701. Official badges, identification cards, other insignia.** Limits use of identification that is similar to federal government identification.
- **18 USC 712. Misuse of names, words, emblems, or insignia.** Prohibits use of the words national, federal, United States or letters U.S. in the performance of private investigations.
- **15 USC 45. Unfair methods of competition unlawful; prevention by Commission.** Prohibits deceptive practices in interstate commerce; enforced by Federal Trade Commission.
- **15 USC 1681b. Permissible purposes of consumer reports.** Lists the legitimate reasons to access personal information; part of the Fair Credit Reporting Act which defines what constitutes personal information.
- **15 USC 1692b. Acquisition of location information.** Lists limitations on acquiring personal information while collecting debts; part of the Debt Collection Practices Act.
- **15 USC 1692c. Communication in connection with debt collection.** Places limits on releasing the purpose of this type investigative activity to a third party.
- **15 USC 6821. Protection for Customer Information of Financial Institutions.** Contains prohibitions on misrepresentation to obtain personal information of financial customers; part of the Graham-Leach-Bliley Act.
- **18 USC 2721. Prohibition on release and use of certain personal information from State motor vehicle records.** Limits access to state motor vehicle records; part of Drivers Privacy Protection Act.
- **PL104-191 section 1177 [45 CFR 164]. Wrongful Disclosure of Individually Identifiable Health Information.** Prohibits releasing or obtaining patient information without permission; part of Health Information Portability and Accountability Act.

Notice that the Federal codes limit pretexting in three ways: by prohibiting impersonation of Federal agencies, by prohibiting personal impersonation in limited circumstances, and by defining appropriate use of or access to personal information in certain circumstances. A fourth limitation on pretexting could also be included at this level, but will instead be examined more closely at the state level (Does the acquisition or use constitute some type of theft, fraud, etc.?).

Kansas Statutes. The following Kansas state statutes restrict information access and the use of pretext to obtain information; the Private Detective Licensing Act will be reviewed first followed by the false personation and false representation statutes, and then by appropriate criminal statutes that affect the acquisition transaction.

Private Detective Licensing Act.

- **KSA 75-7b01 (k)(1).** Defines what constitutes "Dishonesty or fraud". Included is: Knowingly making a false statement relating to evidence or information obtained in the course of employment, ...
- **KSA 75-7b04 (d).** Lists qualifications for private detectives; applicants must be screened before licensing. Included are: Committed any act constituting dishonesty or fraud; and A bad moral character or a bad reputation for truth, honesty, and integrity.
- **KSA 75-7b08 (b).** This section lists a number of activities which licensees may not perform. Included are the following which pertain to pretexting:
 - Use a badge in connection with the activities of the licensee's business other than a firearms permit identification badge authorized by this act.
 - Use a title, wear a uniform, use an insignia or an identification card or make any statement with the intent to give an impression that the licensee or individual is connected in any way with the federal government, a state government or any political subdivision of a state government.
 - Use an alias in connection with the activities of the licensee's business.
 - Manufacture or produce any false evidence.
- **KSA 75-7b13 (a).** Lists reasons which allow suspension or revocation of a license. Included are these activities which pertain to pretexting:
 - impersonated, or permitted or aided and abetted an employee to impersonate, a law enforcement officer or employee of the United States of America, or of any state or political subdivision thereof.
 - used any letterhead, advertisement or other printed matter or in any manner whatever represented that such person is an instrumentality of the federal government, a state or any political subdivision thereof.
- has committed any act in the course of the licensee's business constituting dishonesty or fraud.

Notice first that the licensing act contains the same restrictions on impersonating governmental agencies found at the federal level, but expands these to all levels of governmental. It also limits pretexting in the obtaining of information or evidence, but the language and phrasing seems to suggest that the intent is to insure the validity of the information or evidence rather than to limit the method by which it is obtained. The most important point, however, is the prohibition against the use of an alias. This absolutely prohibits the use of any other name to obtain any information. In short, personal impersonation is illegal for private detectives in Kansas while performing any investigation. Now look at the statutes directly on impersonation.

- **KSA 21-3824. False impersonation.** Prohibits representing oneself to be a public officer or public employee or a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas, ...
- **KSA 21-3825. Aggravated false impersonation.** Prohibits falsely representing or impersonating another and in such falsely assumed character:
 - (1) Becoming bail or security, ...
 - (2) confessing any judgment;
 - (3) acknowledging the execution of any conveyance of property, or any other instrument which by law may be recorded; or
 - (4) doing any other act in the course of a suit, proceeding or prosecution ...
- **KSA 21-3830. Dealing in false identification documents; vital records identity fraud related to birth, death, marriage, and divorce certificates.** Includes reproducing, manufacturing, selling or offering for sale any identification document ...

The state statutes do not directly limit the impersonation of a person, only public officers, public officials or licensed professionals (this would include licensed private detectives). Consequently, pretexting is limited primarily by the intent or nature of the impersonation act. This requires looking specifically at whether the access to personal information is directly prohibited or whether the usage of the information is fraudulent in some manner. It also requires examining the legal status of information; is it property? Here are statutes which may apply:

- **KSA 45-215 Open Records Act.** Establishes state records as open access unless specifically exempted as listed in the act.
- **KSA 21-3701 Theft.** Contains limits on property transfer by exerting unauthorized control or by obtaining the property by deception.
- **KSA 21-3704. Theft of services.** Prohibits obtaining services from another by deception, threat, coercion, stealth, tampering or use of false token or device.
- **KSA 21-3705. Criminal deprivation of property.** Prohibits obtaining or exerting unauthorized control over property, with intent to deprive the owner of the temporary use {or benefit} thereof, without the owner's consent ...
- **KSA 21-3755. Computer crime; computer password disclosure; computer trespass.** Computer crime includes:
 - Intentionally and without authorization accessing and ... copying, disclosing or taking possession of a computer ... or any other property;
 - using a computer, ...for the purpose of obtaining money, property, services or any other thing of value by means of false or fraudulent pretense or representation; or
 - intentionally exceeding the limits of authorization and ... copying, disclosing or taking possession of a computer, ... or any other property.

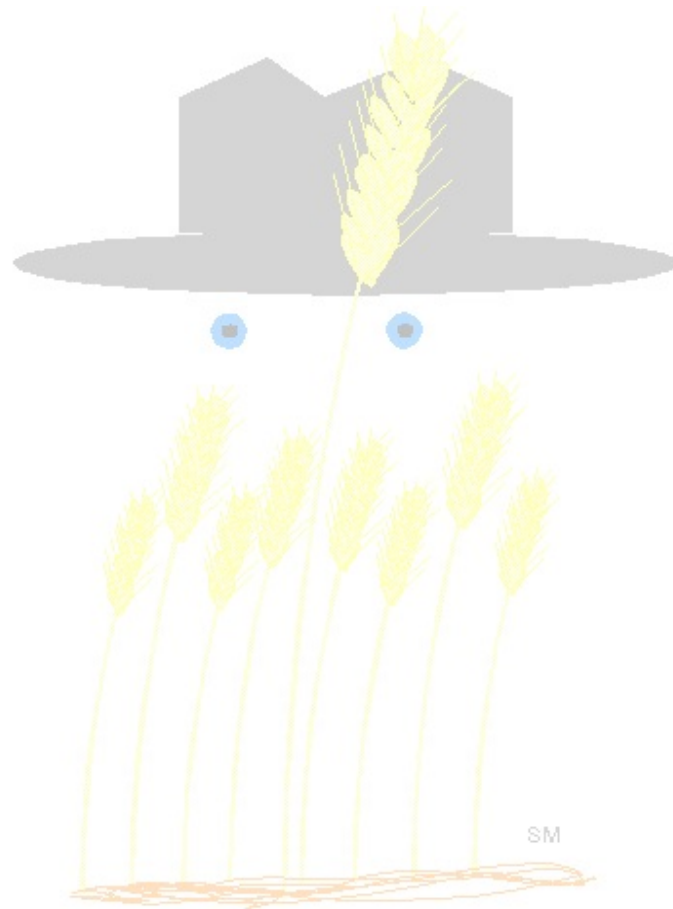
The state has determined that its records are public unless specifically exempted from release. The listing of exempted records is lengthy, but not all inclusive. Consequently, it is necessary to examine the type of information being accessed to determine whether access is prohibited without regard to the method being used to obtain it. The key points in the other statutes are whether the information is property and whether the access to or control of the information storage system is authorized. Information can clearly be considered property in some cases such as copyrighted material, trade secrets, or business databases that are assembled as the result of the business activity. Then obtaining them without appropriate permission is actually a theft; the principle question is what value it has. But is other information property? This issue will be examined in case law. However, it may not matter. Notice that if the information is not property, the service being provided does have value. Consequently, obtaining non-proprietary information by deception would become a theft of services or a computer crime under those statutes.

To summarize, the Federal Codes and Kansas Statutes either directly or indirectly prohibit or limit pretexting in four ways:

- Prohibitions on impersonations of governmental agencies, public officers, public officials or licensed professionals.
- Prohibitions on personal impersonation in limited situations.
- Specifying the circumstances or purposes for which information can be obtained.
- Protecting information with criminal penalties for unauthorized access or use in certain

circumstances.

In part two of this article, Federal and Kansas case law will be examined for additional clarification. Then, examples of private detective actions which constitute pretexting will be examined and the identified limitations applied. This should produce reasonable guidance for the use of pretexting by Private Detectives in Kansas.



Pretexting: An Examination of the Legal and Ethical Limits; Part II

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In Part I of this examination pretexting was defined as “a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.” The application of this definition was briefly applied to private detectives, mentioning the inherent difference of cloaking or misdirecting in active versus passive investigative activities. The examination identified two forms of pretexting recognized in legal references as false personation (falsely assuming the identity of another) and false pretense (false representations of material past or present facts). Searching the Federal codes and State statutes identified essentially four forms of restrictions on the use of pretexting; these are:

- Prohibitions on impersonations of governmental agencies, public officers, public officials or licensed professionals.
- Prohibitions on personal impersonation in limited situations.
- Specifying the circumstances or purposes for which information can be obtained.
- Restricting access to computers, files, databases or records in certain circumstances.

Working from these essentials, the examination will continue with a short review of Federal and Kansas case law pertaining to pretexting and then apply all of the results to typical private detective situations. The goal is to identify the limits on pretexting for Private Detectives in Kansas.

Federal Cases. The Federal cases relating to pretexting deal primarily with impersonation of public officials. A 1915 case addressed the question of impersonating an actual Federal agency or official and a non-existent one; it upheld a broad interpretation. The courts continued this broad approach in a 1943 case advising that it was sufficient to show that an ‘official’ character was assumed, and added comments concerning the victim impact of the activity and the value of the information obtained.

US Pa 1915 US v Barnow, 36 S.Ct 19, 239 US 74. A false representation as to an office having no legal existence is within criminal code punishing one who, with intent to defraud, falsely assumes to be an officer or employee of the United States. 18 USC 76.

US Mo 1943. US v Lepowitch, 63 S.Ct. 914, 318 US 702.

Under false personation statute, government officials are ‘impersonated’ by any persons who assume to act **in the pretended character, and hence the most general allegation of impersonation of a government official sufficiently charges that element of the offense.**

The words ‘intent to defraud’ within false personation statute providing that whoever with intent to defraud shall falsely pretend to be an officer or employee acting under authority of the United States or any department or any officer of the government shall be guilty of a crime, do not require more than that the defendants have, by **artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.**

The provision of the false personation statute penalizing the impersonation of federal officers with intent to

defraud covers the acquisition of information by impersonation although the information may be wholly valueless to its giver. 18USC 76.

The three interpretation points that can be seen from these Federal cases are:

- Impersonation of a government official does not depend on the official being real, only that a 'government persona' is assumed.
- The false persona must influence the deceived person's course of action.
- Information is not required to have inherent value in order to meet legal standards for fraudulent use.

Examination of Kansas cases pertaining to false personation and false pretense shows that these principles are not entirely supported in Kansas state courts. One important additional principle does appear in the state case review.

Kan 1993 State vs Donlay, 853 P.2d 680, 253 Kan 132.

Proceeding for purposes of statute defining aggravated false impersonation as falsely representing or impersonating another in doing any other act in course of suit proceeding or prosecution, is attempted enforcement of **right of law in prescribed manner and requires commencement of an action; mere preparation is not a proceeding.**

Person who falsely signed traffic ticket with wrong name and DL # could not be charged since complaint had been dropped against actual person.

Kan 1990 State v Banks, 790 P.2d 962, 14 Kan App 2d 393. Impersonation of actual person is element of aggravated false impersonation. KSA 21-3825.

Kan. 1945. State vs Bishop, 160 P.2d 658, 160 Kan. 233. Under statute creating state highway patrol, highway patrolman has power of police or peace office only under circumstances therein set forth, and a person could not be convicted of impersonating an officer by claiming to be a highway patrolman except in one of circumstances set out in such statute.

Kan 1959 State vs Handke, 340 P.2d 877, 185 Kan 38. It is a false pretense if a man represents himself to be in a situation or business in which he is not.

Kan 1993 State v Schultz 850 P.2d 818, 252 Kan 819. To prove theft by deception, state must prove that defendant **obtained control over property by means of false statement or misrepresentation, that false statement or misrepresentation deceived victim, and that victim in whole or in part relied upon false statement in relinquishing control of property to defendant.**

Notice that the Kansas cases on false personation differentiate between actual persons or actual public officials taking the position that impersonation of a public officer requires that you attempt to act in the official capacity, not just assume the public official's persona. The differentiation on actual persons is made in two circumstances, first for fixing the level of the offense (misdemeanor versus felony), and second for determining whether a legal proceeding is in progress. The second is a very important distinction for Private Detectives. It appears that the courts would be more tolerant of pretexting which occurs in the investigative stages of any legal action than it would be of pretexting after the legal proceeding commences. That interpretation is rendered concerning the language in a false impersonation statute. However, in the false

pretense cases, the Kansas courts are not applying the distinction between actual and fictional persons or officials. The test is simply whether the action was deceptive; in short, it follows the Federal standards previously mentioned. The Federal District Court for Kansas also has limited cases that pertain specifically to pretexting; these occur only in civil suits pertaining to false representations by businesses in employee actions or in police investigative stops.

D.Kan 2005 Oglesby vs HyVee, Inc. 402 F.supp 2d 1296. In employment discrimination case, evidence of pretext may take variety of forms; employee can show pretext by pointing to such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in employer's proffered legitimate reasons for its action that reasonable fact finder could rationally find them unworthy of credence.

D.Kan 1991. US vs \$83,900.00 in US currency. Stop is pretextual where police lack reasonable suspicion necessary to support stop, but use minor violation as basis for their detention in order to search for evidence of unrelated serious crime.

The first case indicates how the courts will evaluate whether an action constitutes pretexting; it will look for inconsistencies or contradictions in the proffered legitimate reasons. Note that the determination of this standard is assigned to the finder of fact. The second case recognizes that a pretext may have a legal basis even if initiated or performed for a disguised purpose and the real question is whether the disguised purpose exceeds the limits of the obvious legal purpose. This determination clearly uses a 'preponderance of the evidence' legal standard.

To summarize the essential points from the case law, the courts will:

- Prohibit assumption of an 'official' persona. It will occasionally accept pretext actions when there is no such public official or agency or when the action was not within the assigned governmental authority.
- Differentiate between assumption of actual personal identities versus fictional identities.
- Differentiate between pretexting performed prior to a legal proceeding and during a proceeding.
- Require a showing that the pretext caused a course of action that was different from that normally followed by the people exposed to the pretext.
- Require a showing that the pretext caused harm.
- Evaluate any pretext on the basis of a preponderance of evidence.

The next step is to examine some investigative situations using the observations developed in the codes and statutes review and the case law review. Below are six situations based on experience, inquiries, and conversations with other private detectives; they will be reviewed against the known standards.

Situation 1. Introduction as a Detective. A licensed private detective interviews a person during the course of an investigation and introduces himself as "Detective Smith". At the end of the interview, the private detective leaves a business card which identifies himself as private detective Smith, not law enforcement officer Smith.

Is this a lawful pretext? Probably not. This introduction is truthful, but is not the whole truth. Consequently, the answer to whether this is a lawful pretext depends on two evaluations: Did the private detective intend that the introduction give him an ‘official persona’; and was the person being interviewed influenced by that ‘official persona’? If either evaluation is yes, then the pretext is probably unlawful. This assumed official persona would show a violation of both the Private Detective Licensing Act and the false impersonation statute in Kansas. The after-interview action of identifying as a private detective probably would not offset the false impersonation intent and clearly does not offset any benefit derived from the false impersonation. If the information obtained during the interview has a protected status, then there might be other violations as well.

Situation 2. *Posing as a Customer of a Realty Business.* A licensed private detective is attempting to locate a debtor for an attorney. He arrives at the last known address of the debtor and finds an empty house with a hand-painted “For Sale” sign in the front yard that lists a name and phone number of an unfamiliar realty company which is not listed in the current telephone directory. The investigator suspects that this may be some type of dodge by the debtor and opts to call the phone number listed on the sign. He states that he is interested in the house, but doesn’t say why. The realtor assumes the private detective is a customer wanting to buy the house and begins asking questions of the ‘customer’ which the investigator answers truthfully. The investigator then makes an appointment to meet the realtor having determined that it appears to be a legitimate small realty firm. At the meeting, the private detective identifies himself as a private detective and states that he is trying to contact the owner; the realtor advises that the house is in probate. The owner is deceased.

Is this a lawful pretext? Yes. While this is an active investigative activity, the private detective did not falsely assume the identity of either a public official or some other person, but simply used his own identity. He just did not state either his occupation or the real purpose of the initial telephone call. When the realtor jumped to an erroneous conclusion, the private detective did not correct it until he could determine that the realtor was a legitimate business and not a participant in hiding the assets of a debtor. He only did what any legitimate customer of a realty firm would do. One additional factor in this evaluation is the limitation that the private detective has in this situation; the Debt Collection Practices Act actually prohibits him from stating the true nature of the call to the realtor who is a third party to the debt collection and thereby restricted from knowing about the debt.

Situation 3. *Disguised as a Construction Worker.* A licensed private detective is assigned to conduct a surveillance of an individual in a disability case and obtain video of the individual performing physical activity which the claimant states he is physically unable to do. The residence is located in a semi-rural area where parking any vehicle will be conspicuous. After scouting the surveillance site, the investigator opts to load his surveillance vehicle with work tools, dress as a construction worker, and pretend to be performing maintenance in the right-of-way next to the roadway while he videotapes from the vehicle.

Is this a lawful pretext? Yes. This is a passive investigative activity; the investigator is only providing a viable explanation for his presence to misdirect the conclusion’s of the person

who is under surveillance. He has neither impersonated a public official nor assumed a false personal identity. In addition, his action has not directly caused the person under observation to do something he would not otherwise do. The purpose of the deception, of course, is for the person under observation to act the way he normally does and just have the opportunity to document that.

Situation 4. *Bureau of Residence Inspections.* A licensed private detective is attempting to locate an individual and believes that he may be living at a specific address. The investigator appears at the address and presents credentials indicating that he works for the “Bureau of Residence Inspections” and needs to determine how many people reside at the residence due to complaint of a code violation. There is no “Bureau of Residence Inspection” in the local or state government.

Is this a lawful pretext? No. The determination on this one may seem a little murky since the private detective is not impersonating a federal official, and since Kansas case law allows impersonation of non-existent officials. However, both the Private Detective Licensing Act and the Kansas False Impersonation statute prohibit impersonating public officials. In this case, the private detective’s intent is clearly to assume an ‘official persona’, and that becomes the decisive factor. Note that the credentials presented may also violate statutes on falsifying identification as well as the Private Detective Licensing Act.

Situation 5. *Posing as a Telephone Customer.* A licensed private detective is attempting to locate an individual and receives information that a relative is calling the individual repeatedly. The investigator calls the telephone company pretending to be the relative and has the phone bill redirected to a new mailing address in order to obtain location leads.

Is this a lawful pretext? No. The private detective has used an alias which is specifically prohibited by the Private Detective Licensing Act. It also raises questions about a possible violation of the Fair Credit Reporting Act since there is not an obvious permissible purpose to access personal identification information under that act. Note that if this technique is used for financial information, it violates the Graham-Leach-Bliley Act which specifically prohibits this form of pretexting.

Situation 6. *Posing as a Lottery Employee/Contractor.* A licensed private detective is attempting to locate an individual. He prepares a check which appears to be for lottery winnings made out to the individual he is seeking and shows it to people he contacts while seeking information on the individual’s location.

Is this a lawful pretext? No. The private detective is assuming an ‘official persona’ which influences the people he contacts. Since the lottery is a state agency, this violates both the Private Detective Licensing Act and the False Impersonation statute.

As you can see from the cited example situations, pretext used in the active phases of an investigation is difficult to perform within the identified legal limits. Passive investigative activity, which concentrates principally upon blending into the background, however, is easy to perform within the identified legal limits. But, even this form of investigation could exceed the

legal limits (dressing as a uniformed police officer is one example). It is also important to remember that both subcontractors and agents working for an investigative agency are bound by the same legal limits; the agency is legally responsible if it knowingly contracts for or accepts work that exceeds the legal limits. Out of sight; out of mind is not an acceptable approach. That attitude is clearly unethical even when the work itself might not be clearly illegal. Which brings the examination to the final goal, what are the guidelines for the Kansas Private Detective based upon the identified limits in the codes, statutes, cases and situations examined?

- **Never assume an ‘official persona’.** Uniforms, insignia, letterheads, credentials, documents, partial statements, etc. which appear to be from any government agency exceed the limitations.
- **Always operate under your own personal or business identity.** Looking and acting like other citizens in the same setting is okay; pretending to be them isn’t.
- **Know the permissible purposes for accessing various types of information; stick to them and require the same from any subcontractor or information source.** Various Federal codes and state statutes list the legitimate reasons for which information can be used; professional investigators know their business and stay within it.
- **Know the access limitations for public records, commercial databases, etc.; stick to them and require the same from any subcontractor or information source.** Federal codes and state statutes identify what is public information and what is private information. Good investigators know what information is legally available and where.
- **Know the evidentiary and procedural limits that apply to any administrative or legal action for which any investigation, interview, process service, surveillance, etc. is conducted; stick to them and require the same from any subcontractor or information source.** The same pretext which is acceptable prior to the initiation of an action may not be acceptable after the action commences.
- **Treat all information as property and the provision of information as a service.** If you wouldn’t obtain a \$50 bill using the technique, why are you trying to obtain information with the same technique?

These guidelines are intended to stay clearly within the legal limits identified in the various Federal codes, Kansas statutes and cases reviewed. But, like all guidelines, there are gray areas in the interpretation and application. The ethical investigator will take the approach that leaves little confusion about his lawful intent. That intent is best communicated by always identifying yourself clearly as a Private Detective or by simply appearing to be or acting as just one more citizen doing only what any citizen could lawfully do at that time and place. Repeated exploitation of the legal gray zone is a habit that identifies the usual bandits and cheaters of various types. It also identifies the unethical investigator. Good private detectives are supposed to assist in identifying and thwarting the bandits and cheaters, not join them. Yes, investigations is a service business and must provide service to succeed. But, when a client mistakenly or deliberately asks for information which can only be obtained by exceeding the legal limits, it is time to advise them that it can not be obtained and why. If they persist, it is time to terminate the service. If you can’t do that, you are not a professional investigator.