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OPINION

■ COMPETITIVE INTELLIGENCE

What are lawyers' limits?

By Melissa Ruman Stewart SPECIAL TO THE NATIONAL LAW JOURNAL

COMPETITIVE intelligence (CI) is a systematic method of collecting and analyzing information on individuals, business entities and competitors. Evidence shows that law firms are taking CI seriously. In March, the American Bar Association featured an article in its *Law Practice* magazine titled, "How to Create and Use Competitive Intelligence: 45 Tips for Law Firms." Associate résumés are disappearing from Web sites, reportedly to reduce the threat of other firms using CI to "steal" young talent. More law firms are hiring professionals trained in the gathering and use of CI, and at least one vendor offers a software program that compiles legal, financial and business content combined with tools to create informative and tactical reports.

Much has been written in the business world about the ethical obligations in the gathering and use of CI. But what about the legal world? To what ethical principles should lawyers adhere?

CI research on a target client can be generated legally, yet yield information that a target wants to keep confidential: the value of homesteads or mortgages, payments and standings, criminal history, religious affiliations, school affiliations, civic affiliations, taxes and more. It is a murky area requiring more attention, and many disagree on what is ethical and what is not.

Should lawyers use information regarding a target's child's preschool or Sunday school class to enroll their own children for the sole purpose of being in a position to get to know the target? Should a lawyer use a target's MySpace page (or, even more worrisome, a MySpace page of a target's child) to research the target and his or her affiliations, friends and habits? Certain lawyers send letters offering their services to handle speeding tickets and car accidents. Should cancer patients receive letters from estate planners because lawyers can buy wig vendors' client lists? Where should the line be drawn?

Experts agree it is unethical to misrepresent one's status or position to obtain information. But what about failing to identify yourself in a public place when others around you are talking about a competitor's proprietary information? Is an act of omission (failing to identify yourself) in the gathering of CI unethical? Is taking advantage of someone else's mistake unethical? What about misrepresenting intent versus identity in gathering CI (saying you are conducting a legal industry survey when you are really only interested in gathering CI regarding a particular subject)? These questions highlight the dichotomy between moral conduct and current ethical standards.

Obviously, CI must be generated legally: Lawyers cannot misrepresent themselves to obtain information, protected information may not be generated, and CI may not be used to bribe or blackmail. Importantly, lawyers must also adhere to their own state ethical codes, but usually the closest ethical code limitation relates to advertising and not the generation and/or use of CI. The Society of Competitive Intelligence Professionals (SCIP) has a required code of ethics, but it does not address the gray areas—and has as its last requirement "To faithfully adhere to and abide by one's company policies, objectives and guidelines." Even so, while legal professionals may belong to SCIP, there is no requirement that law firm professionals generating and using CI belong to SCIP or adhere to its standards.

Clearly the first and minimum standard should be that the generation and use of CI must not constitute illegal activity. The second standard is each lawyer's state ethical code of conduct. However, the general public's sense of propriety—what is right and wrong, or just going too far—is an even higher third standard, but many law firms have not addressed, nor even considered, this standard or its ramifications.

A given CI methodology could, at least theoretically, have the opposite desired effect (i.e., repel rather than attract a prospective client) if the methodology were to become public and the marketplace found it too intrusive. The "public disclosure" test is a good commonsense "gut check"; it is not good business practice to risk adverse market consequences should a lawyer's CI practices offend the public or in some cases even one target client.

The underlying, nagging question is: Should the legal profession proactively consider the ethical issues and create its own ethical standard (taking into account the general public's sense of propriety)? Should the default standard be that lawyers are able to generate and use CI so long as it isn't illegal or contrary to their code of ethics? Or should the legal profession be the leader in establishing what is appropriate and ethical in the generation and use of CI in its profession and, if so, shouldn't that standard be higher than one imposed by the general business community?

Law firms should take the lead

Ideally, as they have done with advertising, each state's bar association or other regulatory body should create a code of ethical conduct relating to the generation and use of CI. In the interim, each law firm should consider the creation of its own clear ethical standard or perhaps, at a minimum, require their professionals to join SCIP and adhere to its ethical code.

Undoubtedly, if individual lawyers and law firms are not proactive in this regard, then at some point in the future, the public disclosure of one lawyer's offensive CI research methodology or use will cause the profession to address these issues publicly—but only after the reputation of the legal profession has been damaged once again. NLJ

Melissa Ruman Stewart is a shareholder in the Dallas office of Winstead and serves as the firm's marketing shareholder. Her practice includes representation of lenders and borrowers in both middle-market and large syndicated loan transactions, and real-estate secured finance.