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## 'Catfishing' Brings Trouble for Pa. Prosecutor and N.Y. Lawyer



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By *Samson Habte*

A Pennsylvania disciplinary board agreed in late August to hear an ethics complaint against a district attorney who created fake Facebook profiles that she instructed subordinates to use "to befriend defendants or witnesses if you want to snoop."

On the same day, a special prosecutor in New York launched an unrelated criminal probe into a Staten Island lawyer and political operative who created a fictitious Facebook profile to carry out what he later described—on Facebook—as a "#DirtyTrick" against an electoral foe of one of his political consulting clients.

There are important differences between the two cases. The disciplinary case is a formal, docketed proceeding that targets a sitting prosecutor for actions she engaged in as a lawyer. The New York matter, by contrast, is in an embryonic criminal probe into conduct that a private practitioner engaged in while working

as a political consultant.

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But the two matters also share a few things in common. Both involve lawyers accused of what's popularly known as "catfishing," or the use of fake online personae to manipulate others. And both lawyers claim—with at least some support—that they did nothing illegal or unethical.

The prosecutor, Centre County (Pa.) District Attorney Stacy Parks Miller, told Bloomberg BNA she got an opinion from an expert on "pretexting" who assured her that it was "ethical and appropriate" for her "friend" defendants on through fake Facebook profiles she created with photographs of women whom bar authorities described as "buxom, scantily-clad young girls."

Pretexting is the legal term for the use of deception or impersonation to gather information from an unwitting

victim.

The New York lawyer, Richard A. Luthmann, told Bloomberg BNA he didn't break any laws by creating fictitious Facebook accounts that purported to be those of politicians running against his clients in various campaigns.

Luthmann allegedly used the profiles to post comments that damaged the electoral prospects of the politicians he impersonated—including, for example, a fabricated comment expressing a city councilwoman's support for bringing a "heroin-methadone den" to her district.

"Most people recognize this for what it was," Luthmann said in an interview. "It was sophomoric and brash, but it was also clearly satire and protected political speech."

Luthmann said he doesn't think he has much exposure to criminal or civil liability. And he said that because the conduct at issue wasn't tied to the practice of law, it shouldn't give rise to disciplinary liability either.

"Just because you have a license to practice law doesn't mean you can be muzzled and prevented from engaging in political speech unrelated to the practice of law," Luthmann said.

Bloomberg BNA asked several experts—including private investigators and lawyers who specialize in ethics, cyberlaw and First Amendment issues—to comment on the legal and ethical consequences, if any, for lawyers who engage in “pretexting” or other deceptive investigative techniques.

Those sources said courts and bar panels have struggled to clearly delineate the ethical boundaries for the investigative tactics of lawyers.

Britney Bella

In May 2011, Parks Miller circulated an [office-wide e-mail](#) to inform her deputies and assistants that she has just “made a facebook page that is fake for us to befriend and snoop.”

“Her name is Britney Bella,” Parks Miller wrote, disclosing the name she chose for the fictitious owner of the new profile. “Use it freely to masquerade around facebook. Please edit it, post things occasionally to keep it looking legit, like things, add things and add friends.”

Bar authorities charged Parks Miller with violating several ethics rules. Several counts are related to the Facebook activity, but Parks Miller is also charged with violating the prohibition on ex parte communications with judges.

According to [the complaint](#), Parks Miller and one judge frequently neglected to copy defense lawyers on e-mails they exchanged about matters before the judge.

The revelations regarding Parks Miller's alleged improprieties, and those of the judges she communicated with ex parte, have triggered several post-conviction motions, including some that led appellate courts to vacate judgments against defendants in cases that were affected by the pretexting and ex parte contacts.

In an e-mail to Bloomberg BNA, Parks Miller defended her investigative techniques. She said she got an expert opinion, authored by an attorney "who wrote the only [Pa.] ethics opinion at the time regarding pretexting," indicating that it was permissible for her to create the Facebook profiles.

Parks Miller declined to comment further. But in [an interview](#) with a local newspaper last year, her lawyer previewed the defense his client is likely to assert at her upcoming disciplinary hearing, scheduled for Nov. 29.

"It would be unethical for a normal lawyer to do it, but a law enforcement

official is different," attorney Bruce Castor said. He analogized Parks Miller's investigative techniques to those used by police officers, who "grow long hair and mustaches and beards" and don't introduce themselves as "detective so-and-so" when speaking to investigative targets.

Castor said that because the DA wears two hats—that of an attorney and that of "the chief law enforcement officer"—she has more leeway when conducting investigations than other lawyers.

Thomas E. Spahn, a partner with McGuireWoods in Tysons Corner, Va., said there is some support for the proposition that government lawyers have more leeway to deploy deceptive investigative techniques than private practitioners do.

Model Rule 8.4 flatly prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." But courts and bar authorities in some states have done away with the "absolute prohibition on deceptive conduct" in cases where such conduct has been deemed "socially worthwhile," Spahn said.

Spahn said that has happened in

cases dealing with, among other things, the use of deception in “criminal sting operations” and “spy operations.”

Bar authorities and courts have also blessed “milder types of deception” in certain civil cases—approving, for example, the use of “testers” in housing discrimination investigations.

“[That] requires creating totally false persona—catfishing on steroids—where you create two families that are exactly the same except their race or sexual orientation,” Spahn said. “But the bars have approved it; they have to approve it—it’s the only way to find [discrimination].”

### '#DirtyTrick'

On Aug. 21, a Staten Island judge appointed a special prosecutor to look into the fake Facebook profiles that Luthmann allegedly created. The judge’s order tasked the special prosecutor with determining whether the creators of those profiles violated criminal statutes governing impersonation, forgery and falsifying business records.

Four days later, Luthmann addressed that development in a lengthy [Facebook comment](#). In that post Luthmann admitted creating a fake Facebook profile that he used to

masquerade as a state assembly candidate who was running in an election against one of Luthmann's clients.

"I am a Trumpian and I play by a different set of rules," Luthmann wrote. "My political Bible was written by Roger Stone. I am a bear with the taste of blood in my mouth. I am a man-eater."

Luthmann said the conduct he engaged in doesn't satisfy the elements of criminal impersonation.

**Pretexting, Parody and Politics**  
Luthmann said he also wasn't worried about possible disciplinary action. He said his alleged conduct wasn't tied to the practice of law, and that because he was engaged in "protected political speech," the First Amendment would be a barrier to ethics charges.

"I don't think an attorney should be disciplined for political satire," Luthmann said.

Eugene Volokh, a First Amendment scholar and UCLA Law School professor, said it's difficult to assess Luthmann's arguments without seeing the comments he allegedly posted on the fake Facebook profiles.

Volokh said comments that are "clear

parodies” to a reasonable person “aren’t impersonation in the legal sense of the word.”

“But if the material wouldn’t be reasonably seen as a parody, [and] would instead be deceptive to reasonable readers, then it’s punishable under the New York [criminal] impersonation statute,” Volokh said.

### Be Careful Out There

On Aug. 23, the Los Angeles County Bar Association issued an opinion entitled, “ [Ethical Risks in Using Social Media](#).” That topic has been discussed in numerous bar opinions over the last few years. But the LA opinion was unique because it was organized around an online “catfishing” incident that caused a lawyer to divulge valuable information to a person who was working as an investigator for an opposing party. The opinion addressed the safeguards and precautions that lawyers should take to avoid getting “catfished” and disclosing client confidences on the internet. The opinion did not address the ethical propriety of engaging in such deceptive conduct. Kevin Mohr, a member of the LACBA’s drafting committee, said that was a conscious decision. “It was really an effort to alert lawyers about some of the

dangers out there," said Mohr, a professor of legal ethics at Western State University College of Law. Mohr said the committee thought that was an important thing to do because a lot of lawyers who discuss their work on social media sites "think that if you just don't mention the client's name, it's okay."

"Quite simply, you can give out enough information [about a client matter] to allow somebody to draw inferences about who the client is," Mohr said.

Ryan Garcia, an in-house lawyer at Dell Inc. and adjunct professor of social media law at the University of Texas, echoed that observation.

"Social media [platforms] are all designed around informal communication, and as people participate in it—and the bulk of their communications end up being about kids, or pets, or friends, or vacations, or how long the line is at Starbucks—it lulls [them] into the sense that this is all just friendly conversation," Garcia said.

"And then sometimes when you start talking about your job, or things that are a little more confidential, you may let your guard down," Garcia said.

Scott L. Malouf, a lawyer and social media consultant in Rochester, N.Y., said the risks of being squeezed for potentially confidential information about a client's case may be higher for some lawyers than others.

Criminal matters and divorce proceedings are examples of cases in which there may be "a heightened risk of catfishing," Malouf said, and lawyers who practice in those areas should be particularly attuned to the risks of inadvertent disclosure.

### Wild West

Mohr said lawyers also need to be attuned to the proliferation of increasingly intrusive surveillance tools that could make it easier for opposing litigants to obtain information about a matter.

He cited "web bugs" as an example. Web bugs—also known as "pixel trackers" or "web beacons"—can allow e-mail senders, including opposing lawyers, to discover information about how e-mails they send have been used.

"They are little spies that infiltrate your computers and report back to the mothership," Mohr said. "They're kind of scary."

Tamara Thompson, an Oakland-based

private investigator, said she is “always batting away queries” from would-be clients who want her to deploy overly intrusive tools against litigation opponents.

Thompson said she’s been asked to “tap phones, break into someone’s cell phone, attach a GPS device to cars and act as some type of enforcer in one betrayal or another.”

But Thompson said she and most of the private eyes she knows spurn those requests.

Thompson polled a half-dozen fellow investigators and said none of them had heard of a colleague engaging in the sort of catfishing described in the LACBA ethics opinion.

Thompson said she’s “never used a pretext to gather information from an opposing witness, attorney or expert.” Any contact like that “would have to be approved by the attorney,” Thompson added, and she “can’t conceive of that happening.”

However, she added, “Passive gathering of online material while using a fake profile is a different matter,” and litigants and lawyers need to be aware of that.

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