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# UPDATE

## Ethical Considerations in Undercover Online Investigations (Part II of II)

By Lori McPherson

**R**ules Prohibiting Fraud, Dishonesty, Deceit, or Misrepresentation  
Prohibitions on lawyer dishonesty, fraud, deceit and misrepresentation are replete throughout every state's rules of professional conduct. Most base their rules on the ABA Model Rules of Professional Conduct,<sup>1</sup> which prohibit dishonest and deceitful activity in a number of different provisions, including Rules 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), 4.1 (Truthfulness in Statements to Others), 4.4 (Respect for Rights of Third Persons) and 8.4 (Misconduct).<sup>2</sup>

*In re Gatti*. The leading case for our purposes regarding these issues is *In re Gatti*,<sup>3</sup> a case out of Oregon dealing with a civil attorney (Gatti) falsely posing as a chiropractor. In an effort to conduct an investigation and acquire information for a possible lawsuit, Gatti contacted a company that employed chiropractors to conduct medical reviews. He represented himself as a chiropractor to both that company and one of the chiropractors whom they had employed in the past. This information came to the Bar's attention, and he was investigated.

*Gatti* involved the Oregon rules similar to ABA rules 4.1 and 8.4(c), which prohibit a lawyer from making a false statement of law or fact. In this case, the Oregon Supreme Court held that Gatti's misrepresentations were a violation of the prohibition on false statements of fact. The court concluded that by "misrepresenting his...identity and purpose when contacting someone who is likely to be adverse to the lawyer's client,"<sup>4</sup> Gatti had violated the Rules of Professional Conduct.

The decision quickly had a very broad impact because the *Gatti* Court specifically addressed situations in which prosecutors might *hypothetically* find themselves, broadly concluding that Oregon "does not permit recognition of an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements."<sup>5</sup>

Out of a concern for ethical liability in *supervising* investigations, the *Gatti* decision "prompted federal prosecutors [in Oregon] to suspend all major federal undercover investigations" for a lengthy period of time.<sup>6</sup> To remedy the situation and curtail the expansive language of *Gatti*, the Rules of Professional Conduct in Oregon were changed to include the following provision, which seems to take care of the problem of prosecutors *supervising* undercover investigations: "it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation...provided the lawyer's conduct is otherwise in compliance with these disciplinary rules."<sup>7</sup>

*Colorado*. Deputy District Attorney Mark Pautler was present at a triple-murder crime scene when he learned that the suspect in the killings was holding a witness hostage.<sup>8</sup> After the police made telephone contact the suspect demanded that he be able to speak to an attorney prior to surrendering. After

unsuccessful attempts at contacting a lawyer, Pautler posed as a public defender on the phone with the suspect, and after a conversation (which was recorded) persuaded the suspect to surrender.

Unfortunately, Pautler failed to disclose his ruse to the suspect—or the suspect's attorney—for a number of weeks. In fact, he was only forced to admit his role in the surrender after the defense attorney recognized Pautler's voice on the recordings of the phone conversation. Because of Pautler's initial deception—and particularly because of his failure to advise anyone of his part in the surrender—he was found in violation of Colorado's Rule 8.4.<sup>9</sup>

*Attorneys Working for Federal Intelligence Agencies*. There are a number of attorneys who work in an intelligence capacity for the federal government, particularly in the Washington, D.C. area. How do the ethical rules concerning dishonesty affect their conduct? This question has been addressed twice.

In 2003, the Virginia Standing Committee on Legal Ethics issued an opinion which took on this issue. The question posed to the committee was whether "intelligence and covert activities of attorneys working for the federal government" were permissible under rule 8.4(c).<sup>10</sup> As will be discussed below, Virginia amended their rule 8.4(c) after the *Gatti* case to prohibit dishonesty and misrepresentation *only* when it "reflects adversely on the lawyer's fitness to practice law."<sup>11</sup> As such, the committee advised that "when an attorney employed by the federal government uses lawful methods, such as the use of 'alias identities' and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law" and, as such, are permissible.<sup>12</sup>

A similar question was presented soon thereafter to the Bar of the District of Columbia: do "attorneys who are employed by a national intelligence agency violate the Rules of Professional Conduct if they engage in fraud, deceit, or misrepresentation in the course of their non-representational duties?"<sup>13</sup> Looking to the purposes for which the rule was adopted, the opinion references the D.C. Court of Appeals, which indicated "its intention to limit the scope of Rule 8.4 to conduct which indicates that an attorney lacks the character required for bar membership," not to every instance of dishonesty in which an attorney might engage.<sup>14</sup> The conclusion reached by the D.C. Bar was that Rule 8.4's prohibitions do not include "misrepresentations made in the course of official conduct as an employee of an agency of the United States if the attorney reasonably believes that the conduct in question is authorized by law."<sup>15</sup>

*Other Jurisdictions*. Utah has given an opinion similar to D.C.'s approach, but also has acknowledged that there is very little precedent to support it:<sup>16</sup> "A governmental lawyer who participates in a lawful covert government operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct."<sup>17</sup> Other jurisdictions, such as Michigan and

Virginia, have solved the problem of prosecutors supervising undercover investigations by changing the wording of their rules to include language which explicitly limits ethical violations to conduct which *reflects adversely on the lawyer's fitness to practice law*.<sup>18</sup>

As of the time of this article, no jurisdiction has given any definitive guidance regarding the specific issue of whether a prosecutor can use *dishonest or deceitful* representations—either personally or through an agent in a supervisory capacity—in an undercover online investigation.<sup>19</sup>

If you have waded through the no-contact provisions and requirements for honesty and candor, now it is time to embark into the “special” responsibilities of prosecutors in the rules of professional conduct.

### Special Responsibilities of a Prosecutor

As a supplement to the remainder of the ethical rules applicable to all attorneys, state rules of professional conduct also outline special (or “additional”)<sup>20</sup> responsibilities for prosecutors. Unfortunately, those prosecutorial responsibilities have very little, if anything, to do with the question at hand. Only two states even *touch* the role of a prosecutor in the investigative stage of a case regarding issues such as contact with suspects.<sup>21</sup> Without clear guidance from the rules of professional conduct in these “special” prosecutor sections, practitioners are left to rely on the interpretations from the other two broad categories of rules.<sup>22</sup>

### Conclusion

As always, a prosecutor must be aware of the ethical constraints attached to being a practicing attorney. All attorneys are ethically obligated to comport their conduct to the rules of professional conduct, and prosecutors are no exception. Being aware of the possible ethical implications in the supervision of undercover online investigations is the first step towards ensuring that prosecutions are conducted in such a way that no prosecutor will ever face disciplinary sanction for trying to enforce the law.<sup>23</sup>

<sup>1</sup> [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html) (last visited November 1, 2006).

<sup>2</sup> The full text of these rules is as follows:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2006).

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or  
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

MODEL RULES OF PROF'L CONDUCT R. 4.1 (2006).

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

MODEL RULES OF PROF'L CONDUCT R. 4.4 (a) (2006).

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;  
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;  
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . .

MODEL RULES OF PROF'L CONDUCT R. 8.4 (a-c) (2006).

<sup>3</sup> In re Gatti, 8 P.3d 966 (Or. 2000).

<sup>4</sup> *Id.* at 974.

<sup>5</sup> *Id.* at 976. In a more recent case concerning Rule 1.2, the Oregon Supreme Court found that an attorney violated the Rules of Professional Conduct when

he posted a profile on Classmates.com pretending to be another person, and suggesting that the person was having illicit contact with students. In re Carpenter, 95 P.3d 203 (Or. 2004). Unfortunately, the attorney doing the sham posting was, at the time, running for District Attorney. He didn't win.

<sup>6</sup> Jeff Adler, *Ruling in Oregon Halts Federal Undercover Probes*, WASH. POST, Aug. 9, 2001, at A3.

<sup>7</sup> OR. REV. STAT. DR. §1-102(D)(2002).

<sup>8</sup> In re Paulter, 47 P.3d 1175 (Colo. 2002). All of the facts in this paragraph are from the opinion.

<sup>9</sup> *Id.* He also was found in violation of Rule 4.3, because he did not simply advise the suspect of his right to counsel and advise the suspect that he was a prosecutor. Paulter's license to practice law was suspended for three months, but that imposition was stayed pending a course of probation.

<sup>10</sup> Virginia Legal Ethics Opinion No. 1765 (2003). This was a reconsideration of a situation presented in Virginia Legal Ethics Opinion No. 1738, 2003 Va. Legal Ethics Ops. LEXIS 1 (2000), which was issued prior to the rewriting of Virginia's rule 8.4(c), which is discussed below. LEO 1738 held that Rule 8.4 “does not prohibit a lawyer engaged in a criminal investigation from making otherwise lawful misrepresentations necessary to conduct such investigations.” 2000 Va. Legal Ethics Ops. LEXIS 4, 21 (2000). This holding, and the wording of rule 8.4(c), as amended, seem to permit *direct* misrepresentations by prosecutors, not just supervising investigators making those misrepresentations.

<sup>11</sup> RULES OF THE VIRGINIA SUPREME COURT, RULE 8.4 (c).

<sup>12</sup> 2003 Va. Legal Ethics Ops. LEXIS 1, \*8.

<sup>13</sup> National Reporter on Legal Ethics and Professional Responsibility, District of Columbia Formal and Informal Opinions, Opinion 323 (2004).

<sup>14</sup> *Id.* Such “other instances of deceit” might include “lying about the lawyer's availability for a social engagement.” *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Thomas H. Moore, *Current Developments 2003-2004: Can Prosecutors Lie?* 17 GEO. J. LEGAL ETHICS 961, 972 (2004).

<sup>17</sup> Utah Ethics Advisory Op. 02-05 (2002), [http://www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_02\\_05.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_05.html). (last visited November 1, 2006).

<sup>18</sup> RULES OF THE VIRGINIA SUPREME COURT, Rule 8.4; Oregon has also endorsed this specific change, OR. CODE PROF. RESP. § 8.4(c), *see also* MRPC 8.4 (Michigan).

<sup>19</sup> Alabama, for example, seems to allow a prosecutor to direct or advise undercover investigations involving deceit, but prohibits a prosecutor from *personally* acting in violation of the Rules of Professional Conduct. ARPC Rule 3.8.

<sup>20</sup> Virginia makes a special note to emphasize that these special responsibilities are “in addition to” the other ethical obligations applicable to every attorney.

<sup>21</sup> Alabama, *supra* n. 25, and Wyoming, Wyo. Prof. Conduct Rule 3.8 (requiring a prosecutor make reasonable efforts to be sure that an accused has been given reasonable opportunity to obtain counsel even if the prosecutor is simply *advising* a law enforcement officer about an interview that is yet to happen).

<sup>22</sup> For a good review of those approaches and recent developments regarding the intersection of national security concerns and professional responsibility obligations, see Eric Morrow, *Current Development 2005-2006: When is Lie not a Lie? When It is Told by the State: Lawlessness in the Name of the Law*, 19 GEO. J. LEGAL ETHICS 871 (2006).

<sup>23</sup> For additional guidance on Prosecution Ethics, see the NATIONAL PROSECUTION STANDARDS (2d ed.), available from the National District Attorneys Association. The full publication is available online at [http://www.ndaa.org/pdf/ndaa\\_natl\\_prosecution\\_standards.pdf](http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards.pdf).

The National Center for Prosecution of Child Abuse is a program of the American Prosecutors Research Institute, the research and development division of the National District Attorneys Association. This publication was prepared under Grant No. 2003-MC-CX-K001 from the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice. This information is offered for educational purposes only and is not legal advice. Points of view in this publication are those of the authors and do not necessarily represent the official position of the U.S. Department of Justice, or NDA and APRIL.



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