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# Deceit in Defense Investigations

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**Deceit in Defense Investigations**

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## Deceit in Defense Investigations

BY PETER A. JOY AND KEVIN C. McMUNIGAL

Prosecutors and police routinely employ misrepresentation and deceit in undercover investigations. In cases ranging from drug distribution, prostitution, and sexual misconduct with minors to organized crime and terrorism, police and those cooperating with police deceive suspects and their cohorts about their identities and their intentions in order to gain information to help uncover past crimes and thwart future crimes. Frequently, such deceit helps reveal the truth about what criminals do and think.

May defense lawyers and investigators working for them employ similar tactics? Or should prosecutors be the only lawyers allowed to direct and supervise investigatory deception? In recent years, both debate and a divergence of views on this question have emerged. In this column we examine that debate, the arguments raised on both sides of it, and how various jurisdictions have answered this question.

### The Deceit Conundrum

Consider the following facts based on a recent case. A lawyer's client is charged with possessing child pornography on the client's work computer and forcing a 12-year-old complainant to view that pornography. The client and complainant were acquainted through a mentoring program and the complainant often spent time at the client's place of work. The complainant knew the client's computer password and offered to show the investigating officer the location of the pornographic images.



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The lawyer learns that the complainant has a history of both false sexual allegations and accessing pornography on the Internet. The lawyer strongly suspects the complainant rather than the client accessed and placed the pornography on the client's computer. The lawyer wants to inspect the complainant's home computer for similar pornography, which would help exculpate the client by suggesting that the complainant rather than the client was responsible for the pornography on the client's computer. The lawyer fears that to ask directly, though, will prompt the complainant to destroy any pornographic images on the home computer.

The lawyer comes to you for advice. The lawyer wants to hire a private investigator to gain access to the complainant's computer through deception. The private investigator would pose as a computer consultant, contact the complainant's family, claim to be conducting a survey of computer use by young people, and offer to swap the home computer for a new laptop computer that would purportedly allow the consultant to monitor the complainant's computer use. The lawyer plans to have an expert examine the computer for pornography. Is the lawyer's plan ethically permissible?

### The Model Rules

A number of ABA Model Rules of Professional Conduct bear upon the lawyer's question about the use of deceit in investigations. Some directly address and categorically prohibit deceit. Others impose vicarious responsibility on lawyers for the acts of nonlawyers.

**Deceit.** Two key Model Rules directly address deceit. One is Model Rule 4.1, which states that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law to a third person . . ." The other is Model Rule 8.4, which provides that "[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

Undercover investigations such as the one proposed by our lawyer in the pornography scenario implicate both these provisions. Investigators going "under cover" by definition make false statements of fact to third persons that constitute misrepresentation and deceit. At the very least, such investigators deceive others about their identities and purposes. The lawyer's investigator, for example, would falsely claim to be a computer consultant

conducting a computer study in order to deceive the complainant and the family. In order to establish credibility in other contexts, investigators may make false statements about such things as having a prior criminal history and connections with criminals.

**Vicarious Responsibility.** Two other Model Rules create vicarious ethical liability for lawyers based on the acts of nonlawyers. Both rules apply to conduct by a nonlawyer that is inconsistent with the professional obligations of a lawyer. Model Rule 5.3, entitled Responsibilities Regarding Nonlawyer Assistants, imposes both obligations and responsibilities on lawyers “[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer.” Section (b) requires a lawyer supervising such a nonlawyer to “make reasonable efforts to ensure” that the nonlawyer’s “conduct is compatible with the professional obligations of the lawyer.” Section (c) applies to conduct of a nonlawyer that would violate the Model Rules “if engaged in by a lawyer” and states that the lawyer “shall be responsible” for conduct by a nonlawyer assistant if the lawyer orders or ratifies the conduct.

The other rule creating vicarious ethical liability is Model Rule 8.4(a): “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 . . . .”

Attorneys, such as our lawyer, who employ nonlawyers to conduct undercover investigations, fall easily within both Rule 5.3(c) and 8.4(a). An investigator hired by a defense lawyer is “employed, retained by, or associated with” the defense lawyer as required by Model Rule 5.3. And such a lawyer knowingly assists and induces the investigator, as required by Model Rule 8.4(a), by providing information and payment.

The combined operation of Rules 4.1(a), 5.3(c), and 8.4(a) and (c) gives rise to the question of whether the lawyer’s supervision of an investigation involving misrepresentation and deceit is unethical. If one were to rely solely on the text of these rules, there would be no question that our lawyer’s supervision of investigatory deceit is unethical. The prohibitions on false statements and deceit found in Model Rules 4.1(a) and 8.4(c) are categorical. Neither rule states any exceptions, whether for investigations or any other purpose.

Should these rules, though, be interpreted more narrowly than they are written? Should courts and ethics authorities through interpre-

tation create an exception allowing lawyers to instigate and supervise investigatory deceit? Or should Rule 4.1 or 8.4 be amended explicitly to incorporate such an exception, either in the rule’s language or a Comment to the rule? Jurisdictions have answered yes to each of these questions.

## The Arguments

A number of arguments can be advanced for allowing criminal defense lawyers to employ deceit in covert investigations.

**Utility.** Legal and ethical prohibitions as well as moral condemnation of deceit are based in part on the harm deceit tends to cause both to individuals and society. Unlike typical deception, though, investigatory deception by police can be useful in revealing truth and falsity. Misrepresentation and deceit by defense investigators is motivated by the same laudable goal as police deception of ultimately producing some greater truth about guilt or innocence. In our fact scenario, for example, evidence of the presence of pornography on the complainant’s computer would help the jury determine the truth about the client’s conduct and the complainant’s allegations. A defense lawyer may want to employ deception in other cases to uncover, prior to trial, misconduct or untruthfulness of key witnesses to persuade the prosecutor to consider dropping or amending charges against the defendant or to impeach the witnesses at trial.

**Necessity.** Investigatory deception, in addition to being useful, is also often necessary in dealing with crimes and criminals. Prosecutors and police argue quite plausibly that they need to use deceit to find the truth because criminal activity tends to be clandestine. Crimes, by their very nature, tend to be committed covertly since detection leads not only to possible punishment but also social condemnation. In addition to having a motive to lie, those who commit crimes are often seen as having poor character relating to veracity, a view reflected in our evidentiary rules regarding impeachment. Also, many witnesses to crimes such as drug distribution and organized crime are likely to have a powerful motivation to lie out of fear of implication or retaliation. Again, deception is often necessary to get such people to reveal the truth.

Defense counsel can make the same arguments. Like prosecutors and police, defense lawyers and their investigators must investigate clandestine activity and deal with people likely to lie.

If anything, one might argue that the defense has greater need than the prosecution for use of investigatory deception. The prosecution is able to make deals with reluctant witnesses to encourage them to come forward and tell the truth. Defense counsel does not have this power.

**Symmetry.** The language of the bans on misrepresentation and deceit found in Model Rules 4.1(a) and 8.4(c) is unqualified. They apply to prosecutors as well as defense lawyers and lawyers in civil practice. Only Florida has amended its

yers to use deception inside the courtroom based on the same rationales?

### Amended Ethics Rules

A number of jurisdictions have modified their ethics rules in ways that allow our lawyer to utilize investigatory deception. States have used two approaches to allowing such deception.

**Supervising Covert Activity.** Some jurisdictions have adopted language explicitly permitting lawyers to supervise covert investigations. Oregon's

## If anything, it might be argued that defense has greater need for the use of investigatory deception.

Rule 8.4(c) explicitly to permit government lawyers to supervise an undercover investigation. It is well recognized, though, that prosecutors regularly supervise and advise police in the use of covert investigations employing misrepresentation and deceit to investigate a wide range of crimes, a tendency that both the "war on drugs" and the "war on terror" have escalated. Despite the categorical ban on supervising and instigating investigatory deceit, prosecutors are not disciplined on the basis of vicarious ethical responsibility for the misrepresentations and deceit of the police and informants they advise and supervise. If prosecutors are thus permitted to supervise investigatory deceit, one can argue that simple fairness dictates that defense lawyers be allowed to do the same.

**Image of the Profession.** One concern with approving of criminal defense lawyers advising and supervising investigatory deception is that it will have a negative impact on the image of the legal profession and the criminal justice system. But, is public response likely to be different to defense as opposed to prosecutorial supervision of investigatory deceit? One can argue that if such deception helps reveal truth and decrease the number of convictions of the innocent, the public response to such deceit might well be positive.

**A Slippery Slope.** Another argument against allowing investigatory deception is that once lying is allowed, it will be hard to set and enforce boundaries on it. If defense lawyers, for example, are allowed to use deception in the investigatory phase of a criminal case because it is useful and necessary in revealing truth, why not allow law-

version of Rule 8.4 states "[i]t shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights." Ohio added a Comment explaining that its Rule 8.4(c) "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law." Wisconsin, in response to a case that inspired the fact pattern featuring our lawyer at the outset of this column, recently added a subsection (c) to its Rule 4.1: "Notwithstanding paragraph (a) and Rules 5.3(c)(1) and 8.4, a lawyer may advise or supervise others with respect to lawful investigative activities."

These jurisdictions authorize deceit only in the context of investigations and only permit lawyers to supervise or advise others, presumably nonlawyers, who engage in deceit. By negative implication, they appear to prohibit lawyers from personally engaging in misrepresentation or deceit and supervising or advising others who engage in deceit outside an investigative context.

**Fitness to Practice Law.** Virginia has taken a different textual route in dealing with deceit in investigations. It modified its version of 8.4(c) by restricting its ban to dishonesty, fraud, deceit, or misrepresentation "which reflects adversely on the lawyer's fitness to practice law." This language is not as clear as the amendments described in the previous section in permitting the supervision of covert investigations. It is

also broader, since its language appears to allow the use of misrepresentation and deceit outside the context of investigations and allows lawyers themselves to engage in acts of misrepresentation and deceit, also known as “pretexting,” in order to obtain exculpatory, impeaching, or mitigating evidence or information.

### Interpretation of Ethics Rules

As suggested previously, another way to allow defense lawyers to use deceit in investigations under unamended versions of the Model Rules is for courts and ethics authorities to interpret rules such as Model Rules 4.1(a) and 8.4(c) more narrowly than they are written and create exceptions allowing lawyers to instigate and supervise investigatory deceit. In doing so, courts and ethics authorities would be using an “intentionalist” method of textual interpretation and relying upon the purposes and policies underlying the ethics rules to create exceptions that override clear text.

This happened in Wisconsin prior to amendment of its version of Model Rule 4.1(a). A Wisconsin case, *Office of Lawyer Regulation v. Hurley*, 2008 Wis. LEXIS 1181, dealt with discipline of a lawyer who, in facts similar to those in our introductory fact pattern, authorized an investigator to use deception to obtain the complaining witness’s computer. After doing so, a forensic computer expert found pornography on the complainant’s computer as the lawyer suspected. Soon after the deceptive investigation was revealed, though, disciplinary charges were brought against the lawyer.

In *Hurley*, a referee assigned to make a report and recommendation in the case found the lawyer’s use of investigatory deceit ethically appropriate. She also found that his conduct was constitutionally mandated in order for him to provide effective assistance of counsel. The Wisconsin Supreme Court later adopted the referee’s report.

### Reasons for Caution

Despite the trend toward approval of defense use of investigative deceit, defense lawyers need to be cautious. The ethics rules of most jurisdictions still set forth an unqualified ban on false statements and deceit and it is uncertain how those rules will be interpreted. Even in jurisdictions that have explicitly approved such deceit, there is ambiguity. Florida has explicitly modified its version of Rule 8.4(c) to allow government lawyers to supervise undercover investigations. Does the fact that the rule mentions only government lawyers mean that defense lawyers cannot supervise such investigations? New York Ethics Opinion 737 (2007) approves limited deceit in the investigation of “civil rights or intellectual property” cases, but is silent on criminal cases. Also if defense lawyers choose to supervise undercover investigations, they need to be careful not to violate either the law or other ethics provisions, such as the anticontact rule, which prohibits contact with a represented person.

### Conclusion

We think the trend in favor of openly allowing lawyers to supervise undercover investigations is generally a positive one. In addition to the fairness of giving criminal defense lawyers the same investigatory tools prosecutors use, it recognizes that criminal defense lawyers often face the same barriers to uncovering the truth as police and prosecutors. In addition, we think that investigations such as the one done in the *Hurley* case not only help uncover the truth, but are unlikely if publicized, to generate a negative public reaction.

We would encourage courts and ethics authorities, though, to consider placing two limitations on such investigations: (1) that the lawyer have a reasonable basis for suspecting the investigative deceit will uncover information important to the case; and (2) that nondeceptive alternatives for obtaining the information are either unavailable or unlikely to be successful. ■