

## Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-05

Issued March 18, 2002

¶ 1 **Issue:** What are the ethical considerations for a governmental lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or deceit?

¶ 2 **Conclusion:** A governmental lawyer who participates in a lawful covert governmental 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. (fn1)

¶ 3 **Background:** A bar member who works for a federal agency that routinely performs undercover investigative work and covert actions directed against criminal and terrorist groups asks whether supervision of or participation in those activities violates Utah Rules of Professional Conduct 8.4(c), which states that: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Similar issues are raised by federal and state prosecutors' supervision of undercover criminal investigations.

¶ 4 **Analysis:** On its face, Rule 8.4(c) would seem to make it professional misconduct for a lawyer to engage in any kind of misrepresentation. However, the Official Comment to Rule 8.4 is read by some to restrict its range to a more limited scope of illegal conduct:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." . . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law

practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category.

Relying on the Comment, commentators David Isbell and Lucantonio Salvi have concluded that Rule 8.4(c) is intended to "apply only to conduct of so grave a character as to call into question the lawyer's fitness to practice law" and does not apply to deception by undercover investigators. (fn2) Furthermore, Congress, in its report on Abscam, indicated that "[i]n this era of increasingly powerful and sophisticated criminals, some use of the undercover technique is indispensable to the achievement of effective law enforcement." (fn3)

¶ 5 Surprisingly, there is little authority bearing directly on the issue of whether Rule 8.4(c) applies to lawyer participation in lawful government covert operations. We are aware of no bar ethics opinions that have faced this question squarely. (fn4) A recent ABA opinion does hold that a lawyer's recording of a conversation without the knowledge or consent of the other party does not necessarily violate the Model Rules. (fn5) It specifically reserves, however, the question presented here:

The Committee does not address in this opinion the application of the Model Rules to deceitful, but lawful conduct by lawyers, either directly or through supervision of the activities of agents and investigators, that often accompanies nonconsensual recording of conversations in investigations of criminal activity, discriminatory practices, and trademark infringement. We conclude that the mere act of secretly but lawfully recording a conversation inherently is not deceitful, and leave for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical. (fn6)

¶ 6 The ABA opinion does cite the Isbell and Salvi article as "discuss[ing] the issue] thoughtfully." (fn7) It also cites the discussion in *Apple Corps, Ltd. v. International Collectors Society*. (fn8) In that case, the plaintiffs suspected that the defendants were violating a consent order limiting the marketing or distribution of stamps bearing the image of The Beatles. In order to investigate, the suspected violations, counsel for the plaintiffs and others under their direction made phone calls posing as consumers. (fn9) When plaintiffs moved for contempt based on alleged violation of the consent order, defendants asked for sanctions against plaintiffs' counsel, claiming, *inter alia*, a violation of New Jersey's Rule 8.4(c). (fn10) Relying largely on the Isbell and Salvi article, the court held that Rule "8.4(c) does not apply to misrepresentations solely as to identity of purpose and solely for evidence gathering

purposes." (fn11) It reasoned:

Undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil rights law enforcement. The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means. (fn12)

¶ 7 The Oregon Supreme Court reached a different conclusion, however, in a recent opinion reviewing a disciplinary decision by the Oregon State Bar. (fn13) The defendant in that case was accused of violating Oregon's prohibition against dishonesty, fraud, deceit and misrepresentation (set forth in DR 1-102(A)(3)) by pretending to be a chiropractor in phone conversations for the purpose of gathering information about suspected fraud by a medical services review company. The accused (supported by the United States attorney, the Oregon Attorney General and others as amici curiae) argued that there should be an investigatory exception to the disciplinary rules for "misrepresentations . . . limited only to identity or purpose . . . made solely for the purposes of discovering information." (fn14) Citing *Apple Corps Ltd.* and the Isbell and Salvi article, the court explained the rationale for an exception:

Those authorities assert that public policy favors an exception that, at the least, allows investigators and discrimination testers to misrepresent their identity and purpose when they are investigating persons who are suspected of engaging in unlawful conduct. The rationale for such an exception is that there may be no other way for investigators or discrimination testers to determine if a person who is suspected of unlawful conduct actually is engaged in unlawful conduct. Therefore, the argument goes, the public benefits more from allowing lawyers to use deception than allowing unlawful conduct to go unchecked. (fn15)

¶ 8 Relying on the plain language of its disciplinary rules, however, the Oregon court declined to find an exception. It concluded that it "should not create an exception to the rules by judicial decree" and that "any exception must await full debate that is contemplated by the process of adopting and amending the Code of Professional Responsibility." (fn16)

¶ 9 "The Rules of Professional Conduct are rules of

reason," however, and "should be interpreted with reference to the purposes of legal representation and of the law itself." (fn17) In light of the Official Comment to Rule 8.4(c) and longestablished practice at the time of its adoption, we do not believe that rule was intended to prohibit prosecutors or other governmental lawyers from participating in lawful undercover investigations. (fn19) We hold that as long as a prosecutor's or other governmental lawyer's conduct employing dishonesty, fraud, deceit or misrepresentation is part of an otherwise lawful government operation, the prosecutor or other governmental lawyer does not violate Rule 8.4(c).

¶ 10 In our view, Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations. We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or "covert" operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. (fn20) We do hold, however, that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation.

#### Footnotes

1. We do not address in this opinion and specifically reserve the issue of whether the analysis and result of this opinion apply to a private lawyer's investigative conduct that involves dishonesty, fraud, misrepresentation or deceit.

2. David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentations Under the Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 816 (1995).

3. See Select Committee to Study Undercover Activities of Components of the Department of Justice, 97th Cong., 2d Sess. 11 (1982), quoted in Shine, Note, *Deception and Lawyers: Away From a Dogmatic Principle and Toward a Moral Understanding of Deception*, 64 Notre Dame L. Rev. 722, 728-29 n. 26 (1989).

4. *But see* Ala. Bar Ass'n, Op. RO-89-31 (interpreting Model Code of Professional Responsibility DR 7-104(A)(1) and holding that it is permissible for a lawyer to direct an investigator to pose as a customer in order to determine whether the plaintiff lied about his injuries).

5. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 01-422 (2001).

6. *Id.* See also Utah Ethics Advisory Op. 69-04, 1996 WL 391435 (Utah St. Bar) (similar result).

7. *Id.*

8. 15 F. Supp. 2d 456, 475-76 (D.N.J. 1998)

9. *Id.* at 458-59, 461-62.

10. New Jersey's Rule 8.4(c) is parallel to Utah's Rule 8.4(c).

11. *Id.* at 475.

12. *Id.* (citations omitted); see also *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983) (authorizing use of "testers" in housing discrimination cases); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) (same); Fred C. Zacharias and Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 107, 231-32 (2000) ("Except with respect to surreptitious tape recording of conversations with witnesses, the reported decisions have never questioned the use of deceit in criminal investigations.").

13. *In re Gatti*, 8 P.3d 966 (Ore. 2000).

14. *Id.* at 974.

15. *Id.* at 975 (citations omitted).

16. *Id.* at 976. In response to the decision in *In re Gatti*, the Oregon legislature passed HB 3857, signed into law on June 28, 2001, which authorizes prosecutors and other government lawyers to "participate in covert activities that are conducted by public bodies . . . for the purpose of enforcing laws, or in covert activities that are conducted by the federal government for the purpose of enforcing laws, even though the participation may require the use of deceit or misrepresentation."

17. Utah Rules of Professional Conduct, Scope.

18. See also Official Comment to Utah Rule 4.2 (making specific approving reference to government undercover investigations). ". . . Also permitted are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is

represented by counsel."

19. Some investigators, including many FBI agents, may be active members of the Bar.

20. See, e.g., Utah Rules of Professional Conduct 4.1(b) (prohibiting knowing failure "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client"); Rule 4.3(b) ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply.

#### **Rules Cited:**

**8.4(c)**