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# Lying By Proxy: Permissible Trickery and Deception by Undercover Investigators

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## White-Collar Crime

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### Lying by Proxy

Permissible trickery and deception by undercover investigators.

BY BARRY R. TEMKIN

IN THE MOVIE "Donnie Brasco," Johnny Depp plays an undercover FBI agent who misrepresents his identity to a Mafia Don, played by Al Pacino, resulting ultimately in the latter's betrayal and death at the hands of his criminal cohorts. Brasco's deception is supervised and encouraged by Justice Department lawyers. In real life, federal and state prosecutors frequently employ undercover investigators who, in the name of the public interest, misrepresent their identities, goals, objectives, backgrounds and other attributes in order to trick unsuspecting suspects into making incriminating admissions that will result in their arrest and incarceration.

There remains little doubt that the use of undercover investigators passes constitutional muster. The federal courts have rejected entrapment challenges to the use of undercover investigators going back to the Prohibition era.<sup>1</sup> And the courts roundly rejected entrapment defenses by the Abscam defendants, congressmen and mayors who solicited and accepted bribes from undercover federal agents and informants posing as oil-rich Arab sheiks. Last year, federal agents penetrated a terrorist ring that was plotting to infiltrate and attack the U.S. Army base at Fort Dix, N.J.

While these investigative techniques are clearly constitutional, there is little ethical guidance for the lawyers who supervise these present-day Donnie Brascos and would-be Arab sheiks. Moreover, if prosecutors may ethically employ lying investigators, what about defense lawyers and civil practitioners?

A June 2009 ethics opinion by the Virginia State Bar Association suggests that staff attorneys for the state grievance committee may employ undercover agents to ferret out and prosecute



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unauthorized practice of law. Particularly given the recent adoption of new ethics rules in New York, the topic is worth a fresh look.

#### The N.Y. Rules of Professional Conduct

New York lawyers must adhere to New York's Rules of Professional Conduct (RPC), which took effect on April 1, 2009.

Rule 8.4 provides that a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>2</sup> Rule 4.1 provides that, "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." The Rules further prohibit a lawyer from using a proxy to do indirectly that which the lawyer may not do directly. A lawyer may not circumvent the rules by violating them "through the acts of another." (RPC 8.4 (a)).

Rule 5.3 provides that lawyers are responsible for the actions of nonlawyers and subordinate lawyers they supervise. "A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate."

(RPC 5.3 (a)).

The Lawyer's Code of Professional Responsibility (Code) antedated the Rules of Professional Conduct and still applies to conduct that took place prior to April 1, 2009. Moreover, the Code informed New York decisions and ethics opinions decided over the past 40 years, including all of the New York cases and ethics opinions discussed in this article.

Disciplinary Rule 1-102(a)(4) of the Code provides: "A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." DR 7-102(a)(5) provides, "In the representation of a client, a lawyer shall not knowingly make a false statement of law or fact." Thus, lawyers may not lie,<sup>3</sup> and they may not circumvent the ethics rules through the actions of others.

The courts have not hesitated to discipline attorneys who have engaged in direct deception and trickery, regardless of motive or proffered justification. In *In re Malone*,<sup>4</sup> a New York lawyer was reprimanded for instructing a witness to give a sworn false statement in the course of an investigation. The lawyer, a government prosecutor, posited that the false statement was necessary to protect the safety of his witness. Not so, said the Appellate Division, imposing sanctions on the lawyer.

And a Colorado court, in a case of some notoriety, suspended a prosecutor who lied about his identity in order to obtain the surrender of a rampaging serial killer who was holding a hostage.<sup>5</sup> The deputy district attorney falsely told the suspect, an axe murderer, that he was a legal aid lawyer. When the ruse was subsequently exposed, the district attorney argued that his deception was justified in order to save the hostage's life. The Colorado Supreme Court held a lawyer may never lie, regardless of the justification, proclaiming: "Prosecutors cannot involve themselves in deception, even with selfless motives..."<sup>6</sup>

#### What if the Deception Is Indirect?

Courts and disciplinary committees throughout the country have been more lenient, however, when lawyers perpetrate their deception indirectly, through the use of investigators.

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For example, a district court judge in the Western District of New York upheld the Justice Department's use of undercover federal investigators who lied to the targets of a criminal investigation.<sup>7</sup> In fact, several ethics committees and courts in jurisdictions outside of New York have endorsed the use of criminal investigators by prosecutors engaged in or supervising undercover investigations. The Utah and Virginia bar associations have opined that it is permissible for a government lawyer to supervise undercover investigations involving deception.<sup>8</sup> Some states have changed their ethics rules (or commentary) to explicitly permit undercover investigations. And several jurisdictions have endorsed direct deception by undercover agents who also happen to be lawyers.

There is no rule, comment or formal ethics opinion in New York authoritatively addressing the use of deception by undercover investigators in criminal investigations. The district court, in *United States v. Parker*,<sup>9</sup> rejected a challenge to the ethics of an undercover sting operation supervised by federal prosecutors, but without a persuasive analysis. The U.S. District Court for the District of New Jersey, in *Apple Corps, Ltd. v. International Collectors Society*, reasoned, in dictum, that, "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."<sup>10</sup>

Professors Fred Zacharias and Bruce Green have written that "prosecutors routinely direct law enforcement agents to mislead suspects about the agents' identities and goals."<sup>11</sup> But direct authority is more elusive.

The New York County Lawyers' Association Professional Ethics Committee has opined that lawyers may ethically employ deception in undercover investigations of civil matters in two specific areas of legal practice: civil rights and intellectual property law.<sup>12</sup> While deception, fraud and misrepresentation are never permitted, lawyers may, in certain circumstances, engage in "dissemblance," which is limited to "misstatements as to identity and purpose made solely for gathering evidence."

NYCLA Ethics Opinion 737 posits that, in civil cases, dissemblance limited to identity and purpose is ethically permissible where:

"(i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and

(ii) the evidence sought is not reasonably available through other lawful means; and

(iii) the lawyer's conduct and the investigators' conduct that the lawyer is supervising do not otherwise violate the Code..." Thus, the New York County opinion limits its reach to misrepresenting identity and purpose in two areas of the law (intellectual property and civil rights) and sidesteps the entire criminal prosecution issue.

## The National Trend

The national trend appears to be towards permitting the use of undercover investigators who dissemble in order to gather evidence of criminal wrongdoing. Perhaps the most striking example of this trend is the use (in some jurisdictions) of undercover deception by disciplinary committee staff investigating unauthorized practice of law.

In order to ferret out unauthorized practice by suspended or disbarred lawyers, or by nonlawyers, grievance committee staff pose as would-be clients, and solicit representation by the targets of their investigation. In the event that the unsuspecting target takes the bait and accepts the ersatz client, the suspended attorney can be prosecuted for unauthorized practice of law or contempt of court.<sup>13</sup>

The Virginia State Bar explicitly considered and approved this practice in a June 16, 2009 Ethics opinion. Virginia Legal Ethics Opinion 1845 considered the conduct of a small-town paralegal who decided to strike out on his own, so to speak, and set up a sub rosa law practice drafting wills and health care proxies on behalf of clients.

Practitioners are well advised to seek advice and counsel before engaging an undercover investigator who may resort to dissemblance.

The Virginia Unauthorized Practice of Law Committee requested permission to run a covert sting operation in which "[t]he tactics or techniques used by the investigator would involve some form of deception, i.e., misrepresentation of identity or purpose, in order to catch the suspect engaging in conduct that is unlawful or criminal."<sup>14</sup> The Virginia ethics committee noted that unauthorized practice of law is a serious crime that is frequently difficult to prosecute without direct evidence, thereby necessitating the use of undercover deception.

According to the Virginia ethics committee, "It is generally known and very well accepted that law enforcement authorities, including government lawyers, are authorized to conduct or supervise undercover operations using deception to gather information about criminal conduct." Thus, the Virginia ethics committee concluded that "it is ethical for staff counsel of the [Virginia State Bar] to direct a bar investigator or other outside investigator/volunteer to engage in covert investigative techniques in the investigation of the unauthorized practice of law in any case in which no other reasonable alternative is available to obtain information against the person engaging in the unauthorized practice of law" (emphasis in original).

While the Virginia opinion is consistent with the overall national trend, New York practitioners should note that Virginia's ethics rules are not identical to those of New York.<sup>15</sup>

## Conclusion

While the New York Rules of Professional Conduct proscribe conduct involving dishonesty, deceit or misrepresentation, some courts and state bars have carved out exceptions for government lawyers who supervise undercover agents involved in law enforcement activities.

New York has not explicitly addressed the issue, although the opinion by the NYCLA Ethics Committee suggests that a lawyer may utilize undercover investigators in intellectual property and civil rights investigations, if there is no other way to obtain the evidence and the investigative techniques do not otherwise run afoul of the ethics code or law.

Given the flux and change in the law on this area, and the recent adoption of new ethics rules in New York, practitioners are well advised to seek advice and counsel before engaging an undercover investigator who may resort to dissemblance. Moreover, lawyers should ensure that the investigators they do employ are aware of the ethical limitations on the use of deception.

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1. Robert Blecker, "Beyond 1984: Undercover in America," 28 N.Y.L. Sch. L. Rev. 823 (1984).

2. 22 NYCRR 1200.00 et seq.

3. Although puffery, exaggeration or misdirection is permissible in settlement negotiations, there may not be outright misrepresentation of facts or law. See ABA Ethics Op. 06-439.

4. 105 A.D.2d 455 (3d Dept. 1984).

5. *In re Pautler*, 47 P.3d 1175 (Colo. 2002).

6. 47 P.3d at 1180.

7. *United States v. Parker*, 165 F. Supp. 2d 431, 478 (W.D.N.Y. 2001).

8. See Barry R. Temkin, "Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis," 32 Seattle U. Law Rev. 123, 151-57 (2008) (cataloguing state ethics opinions regarding undercover investigations).

9. *Supra* note 7, at 478.

10. 15 F. Supp. 2d 456, 476 (D.N.J. 1998).

11. Fred Zacharias and Bruce Green, "The Uniqueness of Federal Prosecutors," 88 Geo. L.J. 207, 231 (2000).

12. NYCLA Ethics Op. 737, available at [www.nycla.org](http://www.nycla.org). As Chair of the NYCLA Professional Ethics Committee, the author helped draft the opinion.

13. William Wernz, "'Pretexting,' Prevaricating and Getting the Facts," 10 Minn. Lawyer, No. 44 (Oct. 30, 2006) available at <http://www.minnlawyer.com/article.cfm?recid=74661>.

14. Available at [www.vacle.org/opinions/1845.htm](http://www.vacle.org/opinions/1845.htm) at 2.

15. Virginia's RPC 8.4 proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." (emphasis added).