Roundtable on the ABA Defense and Prosecution Function Standards

Friday, September 17, 2010
University of Wisconsin Law School

Discussion Papers

The papers produced as part of the nationwide discourse on the revisions to the American Bar Association's Criminal Justice Standards for Prosecution and Defense Functions will be published concurrently by the Hastings Law Journal and Hastings Constitutional Law Quarterly in the spring of 2011.

62 HASTINGS L.J. (forthcoming May 2011)
38 HASTINGS CONST. L.Q. (forthcoming Apr. 2011)

Candor, Deceit and Disclosure in Criminal Practice

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A Background Paper for Roundtable Discussion of Revisions to the ABA Prosecution and Defense Function.

I. Overview

The American Bar Association's Model Rules of Professional Conduct and state legal ethics codes have long had categorical rules banning lawyers from making false statements of fact or law or engaging in "dishonesty, fraud, deceit, or misrepresentation." These rules contain no qualifications or exceptions for prosecutors, criminal defense counsel, or lawyers in civil practice.

Our roundtable discussion will focus on whether lawyers in certain circumstances should be allowed to make false statements and engage in deceit. If so, which lawyers should receive such an exemption? Only prosecutors? Or both prosecutors and criminal defense counsel? Under what circumstances and in what contexts should false statement and deceit be permitted? Recently a number of jurisdictions have explicitly modified their ethics rules to allow false statement and deceit by lawyers in certain contexts.

Here is a brief summary of the key questions on which analysis and debate regarding permissible deceit have focused. We will examine each in detail during our roundtable discussion.

- Should ethics rules for lawyers in criminal practice recognize any exceptions to the bans on false statement and deception?

- *Symmetry.* Should a deceit exception be "symmetrical"? That is, should it apply only to prosecutors? Or should it apply equally to both prosecutors and criminal defense lawyers alike?
- *Personal vs. vicarious*. Should a lawyer be allowed personally to make false statements or deceive? Or should only vicarious falsity and deceit by lawyers be allowed? In other words, should prosecutors or defense lawyers themselves be allowed to make false statements or engage in deceitful conduct? Or should any exception be purely vicarious -- allowing lawyers to advise and supervise non-lawyer investigators using false statement and deceit, for example in an undercover investigation as long as the lawyers themselves do not make false statements or engage in deceptive conduct?
- *Limitations*. If recognized, what limitations should be placed on such an exception? For example:
    - *Investigations*. Should permissible deceit be limited solely to the investigatory stage of a criminal case?
    - *Necessity*. Should a showing of necessity be required (i.e. that non-deceitful investigatory mechanisms have not worked or would not work to obtain the information sought) before a lawyer resorts to deceit?
    - *Reasonable suspicion*. Should a lawyer be required to show a reasonable suspicion of some improper activity before engaging in, advising, or supervising the use of deceit to investigate that activity?
- *Contexts*. If recognized, should deceit be limited only to certain approved contexts? For example:

- *Undercover investigations*. Should permissible deceit be limited to undercover investigations in criminal cases?
- *Recording*. Should secret recording by lawyers of potential witnesses, clients, or other lawyers be allowed?

II. Vicarious Deceit and Undercover Investigations.

I focus first and most extensively below on deceit in undercover investigation for several reasons. First, it has been the subject of much recent activity by state ethics authorities both in amending ethics rules and in writing ethics opinions. Second, situations in which deceit in the form of an undercover investigation will appear useful and perhaps necessary are among the most likely to confront both prosecutors and defense counsel. Third, the topic of undercover investigations provides a good vehicle for introducing and reviewing the arguments advanced in the larger underlying debate about creating a deceit exception for lawyers.

A. The Model Rules

A number of ABA Model Rules of Professional Conduct bear on the use of deceit in investigations. Some directly address and categorically prohibit deceit. Others impose vicarious responsibility on lawyers for the acts of non-lawyers.

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 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. In order to establish credibility, investigators may also 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 . . . ."

Defense attorneys 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. Police working with prosecutors are clearly "associated with" those prosecutors.

The Deceit Dilemma

Prosecutors

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 uncover past crimes and thwart future crimes. Frequently, such deceit helps reveal the truth about what criminals do and think.

The combined operation of Rules 4.1(a), 5.3(c), and 8.4 (a) and (c) gives rise to the question of whether a prosecutor'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 a prosecutor's supervision of investigatory deceit is unethical. The prohibitions on false statements and deceit found in Model Rule 4.1(a) and 8.4(c) are categorical. Neither rule states any exceptions, whether for investigations or any other purpose.

Defense Counsel

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.

Consider the following facts based on a recent case.

> Lawyer's client is charged with possessing child pornography on his work computer and forcing a 12 year old complainant to view the pornography. Client and complainant were acquainted through a mentoring program and complainant often spent time at client's place of work. Complainant knew client's computer password and offered to show the investigating officer the location of the pornographic images.
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> Lawyer learns that complainant has a history of both false sexual allegations and accessing pornography on the internet. Lawyer strongly suspects complainant rather than his client accessed and placed the pornography on client's computer. Lawyer wants to inspect complainant's home computer for similar pornography, which would help exculpate client by suggesting that complainant rather than client was responsible for the pornography on client's computer. Lawyer is afraid, though, that if he asks openly to do so, complainant will destroy any pornographic images on his computer.
>
> Lawyer comes to you for advice. He wants to hire a private investigator to gain access to complainant's computer through deception. The private investigator would pose as a computer consultant conducting a survey of computer use by young people. He would contact complainant and his family and offer to swap complainant's computer for a new laptop computer that would purportedly allow the consultant to monitor complainant's computer use. Lawyer plans to have an expert examine the computer for pornography.

Is Lawyer's plan ethically permissible?

Again, as pointed out above, if one were to rely only on the text of Rules 4.1(a), 5.3(c), and 8.4 (a) and (c), there would be no question that the defense lawyer's supervision of investigatory deceit in the above fact pattern is unethical. The prohibitions on false

statements and deceit found in Model Rule 4.1(a) and 8.4(c) are categorical and neither rule states any exceptions.

Should these rules be interpreted more narrowly than they are written? Should courts and ethics authorities interpreting them create an exception allowing defense 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?

The Arguments

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

Utility

Legal and ethical prohibitions as well as moral condemnations 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 client's conduct and complainant's allegations. A defense lawyer may want to employ deception in other cases prior to trial to uncover misconduct or untruthfulness of key witnesses to persuade the prosecutor to drop or amend charges or 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, are usually committed covertly since detection leads not only to possible prosecution and 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 as police and prosecutors about the need for deceit in investigating criminal cases. 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 encourage reluctant witnesses to come forward and tell the truth by make deals with them. Defense counsel does not have this power.

Symmetry

The language of the bans on misrepresentation and deceit found in Model Rule 4.1(a) and 8.4(c) is unqualified. They apply to prosecutors as well as defense lawyers and lawyers in civil practice. 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.

A few jurisdictions have created exemptions for prosecutors. Florida, for example, amended its Rule 8.4(c) explicitly to permit "a lawyer for a criminal law enforcement or regulatory agency" to supervise an undercover investigation. A Utah ethics opinion reaches the same conclusion. In other jurisdictions, despite the categorical ban on supervising and instigating investigatory deceit that still exists, 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. Prosecutors are thus given *de facto* exemption to supervise investigatory deceit. One can argue, then, that simple fairness dictates that defense lawyers be allowed to do the same.

Image of the Profession

One concern with approving of 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. Public response to government investigatory deceit, though, is not likely to be negative. It is, after all, sympathetically portrayed in countless movies, television programs, and novels. Is public response likely to be negative 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 lawyers 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 lawyers to utilize deceptive investigations. States have used several approaches to allowing such investigations. As noted above, Florida and Utah have exempted only government lawyers from deceit rules when pursuing undercover investigations. Several other jurisdictions have adopted a symmetrical approach, exempting both prosecutors and defense counsel. These jurisdictions have taken two different textual routes to accomplishing this objective.

Supervising Covert Activity

Some jurisdictions have adopted language explicitly permitting lawyers to supervise covert investigations. Oregon's version of Rule 8.4 is the most comprehensive. It 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 that appears at the outset of this paper, 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 variations authorize deceit only in the context of investigations. By negative implication, they appear to prohibit lawyers from personally engaging in misrepresentation or deceit. They only permit lawyers to supervise or advise others, presumably nonlawyers, who engage in deceit.

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 in order to obtain exculpating, impeaching, or mitigating evidence or information.

Interpretation of Ethics Rules

Courts and ethics authorities may also 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. 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 Wisc. LEXIS 1181, dealt with discipline of a lawyer who, in facts similar to those in the fact pattern described above, hired 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

expected. 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.

Continuing Ambiguity

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.

III. Personal Misstatements of Fact and Deceit

Another debated question regarding deceit is whether lawyers should be allowed personally to make false statements or engage in deceptive conduct as opposed to advising others who do so. A number of recent cases have addressed this issue.

The Oregon Supreme Court in *In re Gatti*, 330 Ore. 517 (2000), refused to condone any sort of personal deceit by a lawyer, whether working as a prosecutor or as private counsel. In an attempt to investigate suspected fraud by a company that provided medical exams and reviews for insurance companies, Gatti falsely represented himself as

a medical doctor when telephoning employees of the company. The Court found that in doing so Gatti violated bans on both false statement and deceit. Both the Oregon Attorney General and the United States Attorney for the District of Oregon, appearing as amici curiae, asked the Court to create an investigative exception limited to government lawyers. The Oregon Consumer League and other amici curiae urged the Court to create a symmetrical exception for both prosecutors and private counsel. The Court refused to do either, relying in large part on the categorical wording of the ethical bans regarding false statement and deceit. It was in the wake of the *Gatti* decision that Oregon amended its ethics rules explicitly to create a symmetrical investigative exception, as noted in a previous section.

In the years immediately following the *Gatti* decision, the Colorado Supreme Court similarly refused to create an exception for personal false statement and deceit by a prosecutor in *In re Pautler*, 47 P.2d 1175 (2002). In *Pautler*, police were negotiating by telephone with a man who had just committed a series of brutal murders and was still at large. The man asked to talk to a public defender as a condition of surrendering. Pautler, the assistant district attorney at the crime scene, used a false name and impersonated a public defender in a phone conversation with the man, after which the man surrendered. Despite the extraordinary circumstances, the Court refused to find an exception for Pautler and disciplined him.

While in *Gatti* and *Pautler* both the Oregon and Colorado Supreme Courts refused to condone personal deception by a lawyer, the Mississippi Supreme Court has allowed a lawyer to personally engage in investigative deception. In *Mississippi Bar v. Attorney ST*, 1992 Miss. Lexis 415 (1992), the lawyer at issue represented a client

charged with assault who was a member of the local Board of Alderman. Based on procedural irregularities as well as a conversation with the trial judge, the lawyer came to suspect that the charge against his client was the result of a politically corrupt scheme to force his client to resign from office. The lawyer then secretly tape recorded phone conversations between himself and both the trial judge and the chief of police. When asked by the chief of police whether he was taping their conversation, the lawyer falsely denied that he was doing so. The Mississippi Supreme Court found neither the secret taping nor the false denial an ethical violation. In a 2001 ethics opinion, discussed in the next section, the ABA later agreed with the Mississippi Supreme Court's view that secret taping is not unethical, but disagreed with it about a false denial of such taping.

IV. Surreptitious Taping

Secret recording by lawyers of conversations with witnesses, other lawyers, and even clients raises a different aspect of deception than the topics addressed above. While the conduct previously discussed, such as undercover investigations, typically involves false statements of things such as name, identity, and purpose, the deception in secret recording has been seen to arise from failure to disclose. The attitudes of ethics authorities toward the propriety of surreptitious recording by lawyers has undergone a significant transformation in recent decades. Two ABA Formal Opinions, one from 1974 and the other from 2001, are representative of this change.

At the outset it should be noted that some jurisdictions make it illegal for anyone to record a conversation without the consent of both participants and so secret taping of a conversation with another without that person's consent is illegal. In any such

jurisdiction, a lawyer may not engage in secret recording. Jurisdictions in which secret recording is not illegal, though, divide on whether secret recording by a lawyer is unethical.

In Formal Opinion 337 (1974), the ABA took the position, shared by a number of jurisdictions, that secret taping was unethical. In doing so, it relied both on the Model Code of Professional Responsibility's ban on deceit as well as its proscription that a lawyer "should avoid even the appearance of impropriety." The Committee that wrote this opinion noted that under "extraordinary circumstances" a prosecutor might be allowed to secretly record. A year later, in Informal Opinion 1320 (1975), the ABA stated that a lawyer was also prohibited from directing an investigator to secretly tape record.

Twenty-seven years later, the ABA withdrew Formal Opinion 337. In Formal Opinion 01-422 (2001), the ABA reversed position and concluded that secret recording is neither inherently deceptive nor necessarily an ethical violation. In doing so, the ABA aligned itself with a growing trend among states toward allowing secret recoding. These states have pointed out the usefulness of recording in preserving evidence and protecting the lawyer against false accusations by witnesses of improper conduct as well as the fairness of allowing criminal defense lawyers to use a tool that police and prosecutors routinely use during undercover investigations.

ABA Opinion 01-422 (2001), though, like ethics opinions in a number of states, makes clear that a lawyer may not falsely represent that a conversation is not being recorded. There is uncertainty about whether or not it is ethically permissible for a lawyer to secretly record a conversation with a client. States that allow secret recording divide on

this issue and the ABA Committee that wrote Formal Opinion 01-422 split on this question.