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UNDERCOVER INVESTIGATIONS AND GOVERNMENT LAWYERS

*Eric B. Estes**

I. INTRODUCTION

“[N]o sooner is one fraud specifically defined and outlawed than another variant of it appears.”¹

It is difficult to root out fraud. The Office of the Attorney General, as well as numerous other agencies of the State of Arkansas, is, nonetheless, obligated to undertake this effort.² In the case of the Consumer Protection Division, the Attorney General has been charged with the power and duty “[t]o conduct investigations, research, studies, and analyses of matters, to issue reports, and take appropriate action affecting the interests of consumers,” and the Office employs various methods to achieve these goals.³ Because even the most unscrupulous of shysters would be hesitant to directly implicate himself in fraud to a government official, the Office of the Arkan-

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Eric wishes to give sincere thanks to Meghan Joiner, his former law clerk and a student at the University of Arkansas at Little Rock Bowen School of Law, for her assistance in the preparation of this article for publication.

1. *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 826 (Pa. 1974).

2. ARK. CODE ANN. § 4-88-105(d)(3) (2013). The list of Arkansas agencies, boards, and commissions that root out fraud and illegal activity is quite long and includes such organizations as the Arkansas Livestock and Poultry Commission, State Plant Board, Arkansas Bureau of Standards, Arkansas Tobacco Control, Department of Human Services, Department of Health, and Workers’ Compensation Commission. Police agencies and prosecuting attorneys have similar responsibilities in the criminal realm.

3. ARK. CODE ANN. § 4-88-105(d)(3) (2013). *See id.* at § 4-88-105(b) (vesting in the attorney general the power to “appoint such assistants, investigators, and professional and clerical staff as are necessary for the efficient operation of the division.”).

sas Attorney General has often engaged in the use of undercover investigations to obtain evidence and determine the scope of deceptive activities.

In addition to its lawyers, the Consumer Protection Division also employs a number of investigators. In many cases, these investigators assist consumers in the mediation of complaints. In other situations, however, investigators have used undercover identities, computers, addresses, telephone numbers, and credit cards to engage with those who are implicated in fraudulent activities directed towards Arkansas consumers.⁴ In both situations, the investigators work closely with and under the supervision of staff attorneys.⁵

Attorneys General across the nation have historically operated under the premise that, as law enforcement agencies, they had the authority to engage, within lawful and ethical constraints, with those committing deception within their borders. As noted by the National Association of Attorneys General (“NAAG”) within a 2008 communication to its members, there is an existing “right of law enforcement officials to practice deception in undercover operations,” citing *Lewis v. United States*.⁶ A question has now been raised as to whether this allowance exists only for police agencies or whether it also extends to their lawyers.

There is little doubt that the Arkansas Rules of Professional Conduct (“Rules”) apply to *all* lawyers, including those who work for governmental agencies.⁷ Indeed, the application of the Rules to government lawyers has been made clear by the courts of this State. In *Holloway v. Ark. State Bd. of Architects*,⁸ for instance, the Court of Appeals held that “as a lawyer and officer of the court, the Attorney General is subject to the Model Rules of Professional Conduct.”⁹ The question of whether the Rules apply in a blan-

4. To date, no such opinion has focused on whether it is ethical for government lawyers to permit the use of ruse during the course of consumer investigations. Despite this, at least one court has discussed the use of pseudonyms by civil investigators working for state attorneys general. See, e.g., *Brown v. Spitzer Ford, Inc.*, No. 37802, 1978 WL 218210, at *3–4 (Ohio Ct. App. Dec. 7, 1978). In that case, the Ohio Court of Appeals determined that activities undertaken by investigators were “consumer transactions” for the purpose of determining whether a statutory violation had occurred. *Id.* at *5.

5. Pursuant to the Arkansas Rules of Professional Conduct, supervisory attorneys are responsible for assuring that non-lawyer staff members abide by applicable ethical standards. See ARK. RULES OF PROF’L CONDUCT R. 5.3 (2014).

6. Chris Toth, *Don’t Be Deceived. It’s Not a Simple Matter: The Use of Deception by Law Enforcement Attorneys and Rule 8.4(c)*, NAAGAZETTE, Feb. 29, 2009, at 4, available at <http://www.naag.org/publications/naagazette/volume-2-number-3/nt-be-deceived-its-not-a-simple-matter-the-use-of-deception-by-law-enforcement-attorneys-and-rule-8.php>, (summarizing the effect of the ruling in *Lewis v. United States*, 385 U.S. 206 (1966)).

7. See ARK. RULES OF PROF’L CONDUCT pmb1. n.18 (2005).

8. 79 Ark. App. 200, 86 S.W.3d 391 (2002).

9. *Holloway v. Ark. State Bd. of Architects*, 79 Ark. App. 200, 214, 86 S.W.3d 391, 400 (2002), *rev’d on other grounds*, 352 Ark. 427, 101 S.W.3d 805 (2003). The Arkansas Court of Appeals has recognized, however, that there is “a need for adaptation of the ethics

ket fashion, however, has not been fully considered by either the courts of Arkansas or the Office on Professional Conduct.

Honesty is one of many issues addressed by the Rules. On the topic of candor, the Rules provide, “[i]n the course of representing a client a lawyer shall not knowingly: . . . make a false statement of material fact . . . to a third person.”¹⁰ The Rules further provide “[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹¹ While in theory these concepts reinforce long-held beliefs that “honesty is the best policy,” they sometimes work detriment.

In many situations, the government lawyer’s best means of obtaining evidence is to engage, either directly or indirectly, in deception. In most cases, this is a fact-specific inquiry, limited in scope and grounded in common sense. For example, in March 2011, the Attorney General entered into a Consent Decree with an individual that had violated various federal and state laws relating to credit repair services and deception.¹² Among the questions at issue was whether the individual could advertise and solicit business without disclosing that truthful, but negative, credit data could not be deleted from a consumer’s credit history.¹³ Only five months after the case was settled and the individual was enjoined from future credit repair activities, a consumer, who wished to remain anonymous, indicated that that the individual was again offering credit repair services via the social networking site Facebook.

The easiest and most direct means of obtaining evidence supporting the allegation would have been to access the enjoined party’s Facebook page. This action, however, would have required that an employee of the Office of the Attorney General send that individual a “friend” request in order to obtain such access. Traditionally, this would have been done by the use of an undercover identification, so as to obtain necessary documentation without giving an opposing litigant access to personal information that is normally associated with social networking.¹⁴ Due to recent concerns associated with

rules in the Model Rules to the Attorney General and his staff in recognition of the uniqueness of the office, . . . [as well as] the Attorney General’s statutory obligation to protect the public interest.” *Id.* at 216, 86 S.W.3d 400.

10. ARK. RULES OF PROF’L CONDUCT R. 4.1(a) (2014).

11. *Id.* at R. 8.4(c) (2005).

12. State of Arkansas v. Matt Seibert, No. 4:09-CV-960-SWW (E.D. Ark filed Dec. 29, 2009).

13. *See id.* at 3–4.

14. The information typically available on social networking sites involves such things as hometown, employment history, relationship status, family information, political views, and religious affiliations. This information is not of the sort that is traditionally viewed as “public” and that would be disclosed to strangers or adverse parties.

the use of undercover identities and the Rules, however, such a decision was scuttled.¹⁵

Decisions related to the use of deception by government officials to obtain evidence can be broadly divided into three categories: criminal cases, civil cases, and disciplinary cases. Each of these categories will be examined in turn, followed by a look at various approaches to the ethical questions surrounding the use of undercover work by attorneys. Examining each of these categories in turn followed by a look at various approaches to the ethical questions surrounding the use of undercover work by attorneys, this article posits that Arkansas has yet to announce a position with regard to the use of deceptive tactics or misrepresentation when such tactics are nearly the only available means of obtaining evidence necessary to a legal proceeding. Because of the importance of such information and the limited avenues through which it can be garnered, Arkansas should follow those states that have clarified their approach allowing these practices to continue in limited circumstances.

II. CRIMINAL CASES

“There are some situations where the law could not adequately be enforced without the employment of some guile or misrepresentation of identity.”¹⁶

In 1966, the Supreme Court of the United States twice addressed the use of government subterfuge in criminal investigations. In both cases, the use of deceit as a tool for fighting crime was approved. *Hoffa v. United States*¹⁷ involved the use of a government informer as a means to obtain evidence for a federal jury tampering investigation that led to the conviction of famed union leader Jimmy Hoffa.¹⁸ It was alleged that the government informant was, as a result of government payments and reduced charges against him, biased and therefore less likely to be truthful.¹⁹ It was further alleged that, as a result of these deficiencies, the government had violated Hoffa’s constitutional rights, including those under the Fourth, Fifth, and Sixth Amendments.²⁰ The Supreme Court of the United States disagreed, finding that the use of government informants was not *per se* unconstitutional.²¹ In doing so, however, the court cautioned law enforcement officials about the

15. Ultimately, the anonymous consumer provided “screen shots” that permitted the Arkansas Attorney General to move forward with a Motion to Show Cause.

16. *Hoffa v. United States*, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting).

17. 385 U.S. 293 (1966).

18. *Id.* at 293–95 (majority opinion).

19. *See id.* at 298, 310–12.

20. *See id.* at 300–12.

21. *Id.* at 310–12.

use of such subterfuge, stating: “[t]his is not to say that a secret government informer is to the slightest degree more free from all relevant constitutional restrictions than is any other government agent.”²²

Chief Justice Earl Warren dissented from the opinion of the court in *Hoffa* asserting that, under the facts presented, the government was overzealous.²³ Notwithstanding this fact-specific inquiry, Chief Justice Warren agreed that the use of government deceit was not, in all cases, impermissible:

At this late date in the annals of law enforcement, it seems to me that we cannot say either that every use of informers and undercover agents is proper or, on the other hand, that no uses are. There are some situations where the law could not adequately be enforced without the employment of some guile or misrepresentation of identity. A law enforcement officer performing his official duties cannot be required always to be in uniform or to wear his badge of authority on the lapel of his civilian clothing. Nor need he be required in all situations to proclaim himself an arm of the law. It blinks the realities of sophisticated, modern-day criminal activity and legitimate law enforcement practices to argue the contrary.²⁴

Consistent with this theory, the Supreme of the United States went on to affirm the use of undercover work by government officials in *Lewis v. United States*.²⁵ In doing so, the court stated: “it has long been acknowledged by the decisions of this Court . . . that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents.”²⁶

Courts from across the nation have followed this lead. In *United States v. Carona*,²⁷ the United States Court of Appeals for the Ninth Circuit examined, in part, the ethical implications of using an undercover agent to communicate with the target of an investigation who was represented by counsel.²⁸ Here, the undercover agent “was acting at the direction of the prosecutor.”²⁹ Like the court in *Hoffa*, the Ninth Circuit refused to adopt a categorical rule of universal application, instead electing to examine, on a case-by-case basis, those matters involving the use of governmental deceit.³⁰ The court ultimately concluded that the prosecutor had not violated state ethical

22. *Id.* at 311.

23. *Hoffa*, 385 U.S. at 320–21 (Warren, C.J., dissenting).

24. *Id.* at 315.

25. 385 U.S. 206, 212 (1966).

26. *Id.* at 208–09 (citations omitted).

27. 630 F.3d 917 (9th Cir. 2011).

28. *Id.*

29. *Id.* at 921.

30. *Id.*

rules by using a ruse to communicate with a represented party.³¹ “[I]t has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements.”³²

In the mind of a practitioner, communications with represented parties appear to be more ethically questionable than the mere use of a ruse. Indeed, the no-contact provision of the Rules, and the model rules on which they were based, recognize that:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.³³

At least in the criminal context, however, the *Carona* court determined that “[i]t would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel.”³⁴ The Ninth Circuit did not even bother itself with a discussion of whether the use of an undercover agent was a “misrepresentation” within the meaning of other ethical rules.

Despite the prevalence of cases determining that pre-indictment contacts with represented parties are permitted in criminal investigations, the American Bar Association (ABA) has issued an opinion questioning the practice.³⁵ Opinion 95-396 was issued in July 1995 to address attorney communications with represented parties under the no-contact provisions of Rule 4.2 of the Model Rules of Professional Conduct.³⁶ The opinion sharply criticizes those courts holding that pre-indictment contacts are permitted, while recognizing that the decisions remain binding precedent.³⁷ As part of its analysis, the ABA stated: “Although there have been holdings to the contrary, the Committee [on Ethics and Professional Responsibility] believes it is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters, including both federal and state prosecutors.”³⁸ It explained that, while this may limit government investigations into wrongdoing, “the search for truth is not the only value to which lawyers, including govern-

31. *Id.* at 922.

32. *Id.*

33. ARK. RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2014).

34. *Carona*, 630 F.3d at 922.

35. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995).

36. *Id.*

37. *See generally id.*

38. *Id.* at 4.

ment lawyers, must respond.”³⁹ In their concurrence, two members of the Committee advocated further review of this issue by the courts, with hopes that later opinions would conclude that lawyers are prohibited from even pre-indictment contacts with an accused.⁴⁰

Opinion 95-396 did not directly address the use of ruses by investigators who are under the supervision of attorneys. The ABA did, however, appear to conclude that “[t]here is no doubt that the use of investigators in civil and criminal matters is normal and proper. Particularly in the criminal context, there are legitimate reasons not only for the use of undercover agents to conduct investigations, but for lawyers to supervise the acts of those agents.”⁴¹ It is unclear how this statement comports with Opinion 95-396 as a whole. In one respect, the ABA appears to give literal effect to Rule 4.2 and the prohibition of contacts with represented parties in both the civil and criminal context, despite the fact that the application of the Rule, per its admission, “can be an obstacle to investigation.”⁴² The ABA, nonetheless, appears, in *dicta*, to condone misrepresentations by investigators, despite the plain provisions of Rules 4.1 and 8.4.⁴³

Those courts that have examined whether government attorneys may supervise criminal investigations that employ deceit have generally determined such practices to be non-violative of ethical rules. In *United States v. Parker*,⁴⁴ criminal defendants asserted, in part, that the use of confidential sources by government attorneys to gather evidence was deceptive within the meaning of applicable ethical rules and that evidence obtained through these methods should be suppressed.⁴⁵ The court disagreed with these contentions, citing traditional public safety considerations: “Defendant’s logic would, if accepted, mean that government attorneys could not supervise investigations involving undercover agents and informants who cannot reveal their true identity and purpose to the targets of the investigation without thereby rendering the investigation futile and dangerous. There is no authority for such a conclusion.”⁴⁶ This logic is clearly correct. As noted by leading treatise writers, “a rule forbidding a lawyer’s involvement while continuing to allow undercover operations operates to prevent lawyers from serving as a brake or restraint on over-zealous undercover operations by lay-

39. *Id.* at 10.

40. *Id.* at 22.

41. Formal Op. 95-396, *supra* note 35, at 18.

42. *Id.* at 10.

43. *Id.* at 18–19.

44. 165 F. Supp. 2d 431 (W.D.N.Y. 2001).

45. *Id.*

46. *Id.* at 476–77.

investigators.⁴⁷ From a societal point-of-view, it is this result that should be disfavored.

Although the majority of courts have determined that the use of undercover investigations in the criminal context is not unethical, there are limits on an attorney's use of such ploys. Perhaps the biggest limitation is candor to the tribunal. *People v. Reichman* involved a prosecutor's use of the court system to protect the credibility of a government informant.⁴⁸ The actions involved an arrest, the filing of sham criminal charges, and the introduction of false testimony.⁴⁹ In all cases, the court was unaware that a ruse was taking place.⁵⁰ Although the court recognized that undercover operations were not *per se* unethical, it was unwilling to look past public safety objectives under the facts of the case.⁵¹ In sanctioning the prosecutor, the court concluded:

The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility. While the respondent's motives and the erroneous belief of other public prosecutors that the respondent's conduct was ethical do not excuse these violations of the Code of Professional Responsibility, they are mitigating factors to be taken into account in assessing the appropriate discipline.⁵²

Based upon the ruling in *Reichman*, it is likely permissible for prosecutors to engage in and even direct undercover operations. It is, however, unwise to involve a court in these efforts without its knowledge and permission.

III. CIVIL CASES

"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."⁵³

The use of undercover investigations in civil litigation has, also, with limited exception, been approved. Early cases espousing the use of under-

47. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-1(b) n.14 (2007-2008).

48. 819 P.2d 1035 (Colo. 1991).

49. *Id.* at 1036-37.

50. *Id.* at 1037.

51. *Id.* at 1039.

52. *Id.*

53. *Apple Corps, Ltd. v. Int'l Collectors Soc'y*, 15 F.Supp.2d 456, 475 (D.N.J. 1998).

cover work involved the use of “checkers” or “testers” in discrimination cases.⁵⁴ One example of such a case is *Richardson v. Howard*,⁵⁵ which focused on whether courts should discredit a discrimination tester’s credibility based upon material, but necessary, misrepresentations.⁵⁶ The United States Court of Appeals for the Seventh Circuit concluded that the actions of the tester, while deceitful, did not affect the witness’ credibility:

This court and others have repeatedly approved and sanctioned the role of “testers” in racial discrimination cases. It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination.⁵⁷

The court further stated: “We have discovered no case in which the credibility of testimony provided by a tester has been questioned simply because of the tester’s ‘professional’ status.”⁵⁸ No mention was made as to whether the use of testers in discrimination cases was ethical, even though the tester was employed by the same agency as the attorney representing the plaintiff.⁵⁹ The United States Court of Appeals for the Tenth Circuit made similar findings in *Hamilton v. Miller*,⁶⁰ determining that the use of a tester was necessary, despite false pretense.⁶¹

Civil investigators have also been used in cases involving copyright and trademark infringement.⁶² The leading and perhaps most frequently cited case on this topic is *Apple Corps Ltd. v. International Collectors Society*.⁶³ *Apple Corps Ltd.* was a trademark case involving the unauthorized

54. As explained by the Supreme Court of the United States, “‘testers’ are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Testers are also frequently used in employment discrimination cases. See Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 404–06.

55. 712 F.2d 319 (7th Cir. 1983).

56. *Id.*

57. *Id.* at 321 (citations omitted).

58. *Id.* at 321–22.

59. *Id.*

60. 477 F.2d 908 (10th Cir. 1973).

61. *Id.*

62. See *Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998).

63. 15 F. Supp. 2d 456 (D.N.J. 1998).

manufacture and marketing of merchandise depicting The Beatles.⁶⁴ The plaintiffs had previously obtained an injunction to prevent the use of their likenesses for commercial gain.⁶⁵ The case arose out of subsequent attempts by the plaintiffs to purchase merchandise from the defendant in order to determine whether a breach of the injunctive relief had occurred.⁶⁶ All of the attempted telephone purchases occurred by those associated with the plaintiffs or their law firms.⁶⁷ After selling various merchandise, the defendants objected to the use of misrepresentations to test compliance and alleged attorney misconduct.⁶⁸

The United States District Court for the District of New Jersey disagreed that the tactics employed by the plaintiffs and their lawyers were violative of applicable ethical rules:

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.⁶⁹

The lead set by *Apple Corps Ltd.* has been followed repeatedly by civil courts.⁷⁰

In *Gidatex, S.r.L. v. Campaniello Imps., Ltd.*,⁷¹ the United States District Court for the Southern District of New York also examined the use of civil investigators employed by attorneys in a trademark infringement case.⁷² As outlined by the court, the purpose of New York's version of Model Rule 4.1 was to "protect parties from being tricked into making statements in the absence of their counsel and to protect clients from misrepresentations by

64. *Id.* at 458.

65. *Id.* at 458–59. Coincidentally, in 1963, the Beatles recorded a cover of the song "Money (That's What I Want)." In stark contrast, John Lennon recorded "Imagine" in 1971 with the following lyrics: "Imagine no possessions. I wonder if you can."

66. *Id.* at 462–64.

67. *Id.*

68. *Apple Corps Ltd.*, 15 F. Supp. 2d at 472–76.

69. *Id.* at 475 (citations omitted).

70. *See, e.g.*, *Chloe v. DesignersImports.com USA, Inc.*, No. 07–CV–1791 (CS)(GAY), 2009 WL 1227927, at *10 (S.D.N.Y. Apr. 30, 2009) (determining that the use of a pseudonym did not effect the credibility of a witness); *Cartier v. Symbolix, Inc.*, 386 F. Supp. 2d 354, 362 (S.D.N.Y. 2005) (recognizing the decisions of other courts that permitted the use of undercover investigators); *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119, 122–24 (S.D.N.Y. 1999) (holding that the use of undercover investigators was not an ethical violation).

71. 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

72. *Id.* at 120.

their own attorneys.⁷³ Despite the intent of this provision, the court determined that the use of undercover investigators in civil cases was not necessarily prohibited by ethical rules:

These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general.⁷⁴

Ultimately, “undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof.”⁷⁵

Despite the rulings in *Apple Corps Ltd. and Gidatex, S.r.L.*, not all courts are willing to permit attorney involvement in civil investigations. For example, in *Allen v. Int’l Truck & Engine*,⁷⁶ the United States District Court for the Southern District of Indiana addressed attorney oversight of a civil investigation into allegations of racial discrimination.⁷⁷ During the course of the investigation, investigators made contact with multiple plaintiffs and potential class members.⁷⁸ As part of its inquiry, the United States District Court discounted multiple decisions relating to the use of civil investigators, including cases similar to *Apple Corps Ltd. and Gidatex, S.r.L.*⁷⁹ The court further discounted the application of opinions from various sources on the subject, including opinions issued by the ABA.⁸⁰ Ultimately, *Allen* appears to hold that attorneys may not be actively involved in an investigation that results in contact with a represented party.⁸¹ This decision appears to stand in stark contrast to holdings in criminal cases, which allow attorney involvement in investigations, even where contacts with an accused may occur.⁸²

A similar decision was reached by the United States District Court for the District of South Dakota in *Midwest Motor Sports, Inc. v. Arctic Cat*

73. *Id.* at 122.

74. *Id.*

75. *Id.* at 124.

76. 2006 WL 2578896 (S.D. Ind. 2006).

77. *See, e.g., id.*

78. *Id.* at *2–3.

79. *Id.* at *7–8.

80. *Id.* at *8. The accused attorneys cited to ABA Op. 95-396 for the premise that investigators are commonly used in civil and criminal matters. Op. 95-396 is discussed in greater detail *supra*.

81. *Id.* at *6–9.

82. *See, e.g., Carona*, 630 F.3d at 922.

*Sales, Inc.*⁸³ *Midwest Motor Sports, Inc.* involved the use of an undercover investigator to audiotape others in anticipation of trial; in all cases, the investigator masqueraded as a disinterested consumer while interviewing employees of the defendant.⁸⁴ Per the decision of the court, the conduct undertaken by the lawyer through the investigator was not permitted and was, accordingly, deemed unethical under the South Dakota Rules of Professional Conduct.⁸⁵ In this case, it was impermissible for an attorney to use an investigator to conduct clandestine activities with an employee of a represented litigant.⁸⁶ Although the court recognized the holding in *Apple Corps, Ltd.*, it ultimately concluded that “South Dakota law is crucially different.”⁸⁷ The attorneys who used the investigator were ultimately punished through evidentiary sanctions, as opposed to ethical sanctions.⁸⁸ The court, however, warned others in the community: “The sanctions in this case were relatively light because some aspects of the law were unclear. If counsel practicing before this Court commit similar ethical violations in the future . . . the sanctions imposed will not be so lenient.”⁸⁹

The dichotomy in decisions between *Apple Corps, Inc.* and *Midwest Motors Sports, Inc.* was later recognized by the United States District Court for the Northern District of Illinois. In *Hill v. Shell Oil Co.*,⁹⁰ the defendant sought to prohibit the plaintiff’s attorney from using investigators to videotape consumer transactions in which they engaged with the defendant and its retailers.⁹¹ Recognizing the split in authority, the Court stated:

[W]e think there is a discernible continuum in the cases from clearly impermissible to clearly permissible conduct. Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. They cannot normally interview protected employees or ask them to fill out questionnaires. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course.⁹²

Ultimately, the court punted and pushed a decision on the merits of the conduct to a later date, deciding that “[t]o the extent that employees and

83. 144 F. Supp. 2d 1147 (D. S.D. 2001).

84. *Id.* at 1150–53.

85. *Id.* at 1157–58.

86. *Id.*

87. *Id.* at 1158.

88. *Id.* at 1159–60.

89. *Midwest Motor Sports Inc.*, 144 F. Supp. 2d 1160.

90. 209 F. Supp. 2d 876 (N.D. Ill. 2002).

91. *Id.*

92. *Id.* at 880.

plaintiffs have substantive conversations outside of normal business transactions, we will consider whether to bar that evidence when and if it is offered at trial.”⁹³ Little was communicated to the legal community as to whether similar conduct would be deemed unethical in the future.

IV. DISCIPLINARY CASES

“Faithful adherence to the wording of [the Rules of Professional Conduct] and this court’s case law does not permit recognition of an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements.”⁹⁴

Despite the prevalence of decisions in both the criminal and civil context approving of deception by lawyers and their investigators as a means of evidence gathering, a number of courts, at least in the disciplinary setting, have been less forgiving. In the case of *In re Gatti*,⁹⁵ the Supreme Court of Oregon considered the ethical implications of an attorney’s use of deception to gather evidence in support of a lawsuit.⁹⁶ As outlined by the court, the attorney, who was a private practitioner, represented to others that he was a chiropractor in order to gather evidence in a fraud case against insurance providers.⁹⁷ According to evidence presented at trial, the attorney had acted in reliance of an opinion by the Oregon State Bar that sanctioned the use of deceit by government attorneys in a case also involving fraud.⁹⁸ The United States Attorney and Attorney General of Oregon appeared as *amicus curiae*, advocating an interpretation of the ethical rules that permitted the use of deceit by government lawyers in the pursuit of legitimate law enforcement activities.⁹⁹

Citing various authority, the accused attorney and government attorneys advocated a decision permitting the use of deception, “assert[ing] 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.”¹⁰⁰ The court disagreed, eviscerating the holding of criminal and civil

93. *Id.*

94. *In re Conduct of Gatti*, 8 P.3d 966, 976 (Ore. 2000) (emphasis in original).

95. 8 P.3d 966 (Ore. 2000).

96. *See In re Conduct of Gatti*, 8 P.3d 966 (Ore. 2000).

97. *Id.* at 969–72.

98. *Id.* at 972–73.

99. *Id.* at 974–75.

100. *Id.* at 975. *See* David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995). Similar articles have also been published. *See* Tory

cases that permitted the use of undercover investigations by lawyers or their investigators. In doing so, the court stated:

As members of the Bar ourselves—some of whom have prior experience as government lawyers and some of whom have prior experience in private practice—this court is aware that there are circumstances in which misrepresentations, often in the form of false statements of fact by those who investigate violations of the law, are useful means for uncovering unlawful and unfair practices, and that lawyers in both the public and private sectors have relied on such tactics. However, ORS 9.490(1) provides that the rules of professional conduct “shall be binding on *all* members of the bar.” Faithful adherence to the wording of [these rules], and this court’s case law does not permit recognition of an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements.¹⁰¹

It was ultimately concluded that “[b]y misrepresenting his identity and purpose and making other false statements [in his interactions with others] with the intention of deceiving them, the accused violated his duty to the public to maintain personal integrity.”¹⁰²

In 2002, the Supreme Court of Colorado issued a decision substantially similar to *Gatti in re Paulter*.¹⁰³ In this case, the attorney, a state prosecutor, had deceived a murder suspect into thinking that he was a public defender in order to facilitate the suspect’s surrender.¹⁰⁴ In addressing this deceit, the court noted that Rule 8.4 and its commentary “are devoid of any exception.”¹⁰⁵ It was further noted that the rules of professional conduct fail to “distinguish lawyers working in law enforcement from other lawyers.”¹⁰⁶ Although the prosecutor asserted that his actions were intended to protect the public from the threat of imminent public harm, the court was unsympathetic:

[W]e are adamant that when presented with choices, at least one of which conforms to the Rules, an attorney must not select an option that involves deceit or misrepresentation. The level of ethical standards to which our profession holds all attorneys, especially prosecutors, leaves

L. Lucas, *To Catch a Criminal, to Cleanse a Profession: Exposing Deceptive Practices by Attorneys to the Sunlight of the Public Debate and Creating an Express Investigation Deception Exception to the ABA Model Rules of Professional Conduct*, 89 NEB. L. REV. 219 (2010); Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123 (2008).

101. *In re Conduct of Gatti*, 8 P.3d at 976.

102. *Id.* at 977.

103. *In re Paulter*, 47 P.3d 1175 (Colo. 2002).

104. *Id.* at 1177.

105. *Id.* at 1179.

106. *Id.*

no room for deceiving [others]. . . [The attorney] cannot compromise his integrity, and that of our profession, irrespective of the cause.¹⁰⁷

Apparently, in the practice of law, an attorney cannot serve two masters. “The obligations concomitant with a license to practice law trump [other] obligations concomitant with a lawyer’s other duties, even apprehending criminals.”¹⁰⁸

Despite the apparent breadth of *Gatti* and *Paulter*, at least one court has been willing to draw a distinction between deception by government lawyers and those in private practice.¹⁰⁹ In *In re Crossen*,¹¹⁰ a judge from the Supreme Judicial Court of Massachusetts examined the use of an elaborate ruse by a private lawyer to establish that a trial court judge was biased against his client.¹¹¹ At the heart of the ruse was a sham job interview with the judge’s clerk that was meant to obtain evidence about the personal and professional character of the judge.¹¹² The attorney asserted that his use of deceit was justified and pointed to one of the secondary authorities discussed in footnote ninety-three in support of his arguments.¹¹³

In addressing these claims, the judge, acting on behalf of the Supreme Judicial Court, was willing to make certain distinctions.¹¹⁴ The judge first made limited distinctions between elementary ruses, such as those involving identity, and those that were more elaborate and involved misrepresentations of a “graver kind.”¹¹⁵ The judge also recognized that certain behaviors could be justified by government attorneys, but not private practitioners.¹¹⁶ As part of this analysis, the judge stated:

The crucial factor distinguishing government and private practitioners is the lack of oversight for the latter. Whatever leeway government attorneys are permitted in conducting investigations, they are subject not only to ethical constraints, but also to supervisory oversight and constitutional limits on what they may and may not do, constraints that do not apply to private attorneys representing private clients.¹¹⁷

The judge continued:

107. *Id.* at 1880–81.

108. *Id.* at 1182.

109. *In re Crossen*, 880 N.E.2d 352, (Mass. 2008).

110. 880 N.E.2d 352 (Mass. 2008).

111. *Id.* at 356–58.

112. *Id.*

113. *Id.* at 376–77.

114. *See generally id.* at 377–78.

115. *Id.* at 377 (citing *Isbell & Salvi*, *supra* note 93). While the judge was willing to recognize this distinction for the sake of argument, no ruling was made as to whether so-called elementary ruses would fall outside the scope of the ethical rules.

116. *In re Crossen*, 880 N.E.2d 378.

117. *Id.*

Constraints on government agents ensure that even undercover investigations conducted by government attorneys are reined in by the stringent constitutional requirements of fair and impartial justice. [The accused's] argument that he felt empowered as a private attorney to conduct the same kind of [investigation as a prosecutor] both overstates the independence of prosecutorial power and understates the unique restraints and oversight on that power.¹¹⁸

Whether other courts are willing to accept similar distinctions without either a formal change in the state ethical rules or as a result of an ethical opinion remains unanswered.

V. JURISDICTIONAL APPROACHES

“[O]nly a handful of jurisdictions have taken steps to ensure that law enforcement attorneys have the legal support to continue the use of deception in undercover and other operations involving deception.”¹¹⁹

To say the least, courts have taken various approaches to the ethical questions surrounding the use of undercover work by attorneys. The cases turn on state, jurisdiction, the type of practitioner, and the type of case involved. The only thing that is clear in this inquiry is that there is no clarity. As outlined by the Model Rules of Professional Conduct, the rules are ultimately ones of reason.¹²⁰ As such, it is reasonable for practitioners to demand that this important question be resolved.

To date, only a limited number of state ethics commissions have addressed the use of undercover investigations involving or supervised by attorneys.¹²¹ As expressed by NAAG, “[t]his leaves the vast majority of law

118. *Id.* at 378–79.

119. Toth, *supra* note 6, at 7.

120. MODEL RULES OF PROF'L CONDUCT, pmb. n.14. As rules of reason, courts have typically employed a common sense approach to the interpretation of ethical rules. As aptly stated by the Court of Appeals of New York:

[W]hat is at issue is a disciplinary rule, not a statute. In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, we are of course bound to implement the will of the Legislature; statutes are to be applied as they are written or interpreted to effectuate the legislative intention. The disciplinary rules have a different provenance and purpose. Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law.

Niesig v. Team I, 558 N.E.2d 1030, 1032 (N.Y. 1990) (citations omitted).

121. Toth, *supra* note 6, at 7.

enforcement attorneys across the country uninformed as to whether their involvement in undercover operations, directly or indirectly, leaves them exposed to ethical complaints.¹²² Short of something being done at the national level with a revision to the Model Rules of Professional Conduct, each state, if they wish to do anything at all, would be required to address this question independently. As discussed *infra*, even among those states that have already addressed undercover operations, there is no uniformity in approach or breadth of protections.

Following the decision in *Gatti*, undercover operations by government attorneys in Oregon ground to a halt. Indeed, a year after the decision was rendered the effects were still being felt. The *Washington Post* reported: “Rather than risk sanction, federal prosecutors stopped signing off on covert operations by the FBI, the Drug Enforcement Administration and other federal agencies in Oregon a year ago.”¹²³ State and local officials also refused involvement in undercover work.¹²⁴

In 2002, subsequent to the *Gatti* decision, Oregon redrafted its equivalent of Rule 4.1. The new rule provides:

It 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, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct. “Covert activity,” as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. “Covert activity” may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the future.¹²⁵

Under this Rule, an attorney may oversee undercover activity, but he may not undertake any such activity on his own.¹²⁶ As outlined in a subsequent legal opinion, “Oregon RPC 8.4(b) is meant to permit a lawyer only to provide advice and supervision regarding covert activity, not to participate directly in that activity.”¹²⁷

The change made by Oregon is quite broad, allowing undercover work in both the criminal and civil setting and by both government and private

122. *Id.*

123. Jeff Adler, *Ruling in Oregon Halts Federal Undercover Probes; Prosecutors Fear Discipline for Advising Investigators in Covert Operations After State High Court’s Prohibition on Deceit*, WASH. POST, at A3 (Apr. 9, 2001).

124. *Id.*

125. OR. RULES OF PROF’L CONDUCT R. 8.4(b) (2006).

126. *See id.*; *see generally* Or. Prof’l Ethics Comm., Formal Op. 2005-173 (2005).

127. Or. Formal Op. 2005-173, *supra* note 126, at 4.

practitioners. It also appears to provide broad discretion to attorneys in determining whether and how to engage in undercover work. This is apparent from the use of the phrase “good faith belief.”¹²⁸

Although no judicial decision had been issued in Florida on the ability of attorneys to engage in undercover investigations, the state nonetheless elected to clarify the scope of its ethical rules to address this topic. In doing so, Florida changed its version of Model Rule 4-8.4 to provide, in part:

A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.¹²⁹

In the case of Florida, the allowance for lawyers to engage in undercover work, either directly or indirectly, is limited to criminal cases or those involving a regulatory agency; there is no allowance for civil attorneys, whether in government or private practice, to engage in such conduct.

Virginia has also addressed the use of undercover activities by attorneys. Unlike the approach taken by Oregon and Florida, the Virginia change was to the state equivalent of Rule 8.4 of the Model Rules of Professional Conduct and not to Rule 4.1. The new language, which is rather subtle in wording, simply provides: “It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer’s fitness to practice law.*”¹³⁰ In the mind of practitioners, this change provided little, if any, additional guidance.

One attorney, employed by an unnamed federal intelligence agency, accordingly sought clarification as to the impact of this rule change on undercover work conducted or supervised by attorneys. In response to this attorney request, the Virginia State Bar Standing Committee on Legal Ethics

128. Per the terms of the opinion, “any review of the rationality of a lawyer’s good faith belief in unlawful activity should be minimal.” *Id.* at 5.

129. FLA. RULES OF PROF’L CONDUCT r. 4-8.4 (2010).

130. VA. RULES OF PROF’L CONDUCT R. 8.4(c) (2014) (emphasis added). This language appears to dovetail off of the previous provision, which makes it professional misconduct to commit a criminal act that, in the language of the Model Rules, reflects on “the lawyer’s honesty, trustworthiness or fitness.” MODEL RULES OF PROF’L CONDUCT R. 8.4 (2011). These acts include those involving fraud or criminal offenses “involving violence, dishonesty, breach of trust, or serious interference with the administration of justice.” *Id.* In most circumstances, the use of an alias for investigatory purposes would not rise to this level of offense.

issued Legal Ethics Opinion 1765.¹³¹ In this opinion, the Virginia Committee affirmed the use of undercover activities by government lawyers, stating:

[T]he committee opines 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; therefore, such conduct will not violate the prohibition in Rule 8.4(c).¹³²

The Virginia Committee further affirmed the reasoning that it adopted years before in Legal Ethics Opinion 1738, dealing with discrimination testers employed by government agencies.¹³³ By Opinion 1738, the committee found:

[T]he conduct of undercover investigators and discrimination testers acting under the direction of an attorney involves deception and deceit. The conduct about which you have inquired arises in the context where information would not be available by other means and without which an important and judicially-sanctioned social policy would be frustrated. These methods of gathering information in the course of investigating crimes or testing for discrimination are legal, long-established and widely used for socially desirable ends.¹³⁴

Appropriately, the Virginia Committee determined that “Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations.”¹³⁵ Despite the apparent breadth of these determinations, language exists in Opinion 1765 that may, nonetheless, limit the decisions to government lawyers.¹³⁶ When comparing the use of discrimination testers to undercover police work, the Virginia Committee noted that there was “no reason to distinguish, for purposes of permissibility of investigative techniques under the Rules of Professional Conduct, between the activities of these two groups of *government attorneys*.”¹³⁷

Although limiting the scope of its rule to prosecuting attorneys, Alabama has also amended its Rules of Professional Conduct to address the use of covert activity. Alabama’s change was to Rule 3.8, which deals with the

131. Va. Bar Ass’n Standing Comm. on Legal Ethics, Legal Ethics Op. 1765 (2003).

132. *Id.*

133. Va. Bar Ass’n Standing Comm. on Legal Ethics, Legal Ethics Op. 1738 (2000). Per the language of the committee, the reasoning employed within Op. 1738 was “extended” to the analysis at issue in Op. 1765. *Id.*

134. *Id.*

135. *Id.*

136. Va. Legal Ethics Op. 1765, *supra* note 131.

137. *Id.* (emphasis added).

special responsibilities conferred on prosecutors.¹³⁸ The amended rule makes clear that a “prosecutor, through orders, directions, advice, and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law.”¹³⁹ As explained in the comments to Rule 3.8:

[I]n undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful government action.¹⁴⁰

Where, however, the Rules of Professional Conduct specifically prohibit certain conduct, such as communications between an attorney and a represented party, a prosecutor remains subject to the prohibition.¹⁴¹

The District of Columbia’s Bar Legal Ethics Committee (the “D.C. Committee”) addressed the ethical issues associated with the use of undercover work by attorneys through an ethics opinion, as opposed to an amendment to the Rules of Professional Conduct.¹⁴² Opinion 323 specifically related to “whether 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 official duties.”¹⁴³ It was determined that these activities did not fall within the scope of Rule 8.4. This decision was based upon three factors.¹⁴⁴

First, the D.C. Committee found that Rule 8.4 was limited to conduct that reflected an attorney’s fitness to practice law.¹⁴⁵ The Rule was not meant to “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.”¹⁴⁶ Next, the D.C. Committee noted that the Rules of Professional Conduct had previously been interpreted by the District of Columbia Bar to permit “lawful law en-

138. ALA. RULES OF PROF’L CONDUCT R. 3.8 (2014).

139. *Id.* at R. 3.8(2).

140. *Id.* at R. 3.8 cmt.

141. *Id.*

142. D.C. Bar Legal Ethics Comm., Formal Op. 323 (2004).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

forcement activity.”¹⁴⁷ Finally, the Rules of Professional Conduct were determined to be, per their own language, rules of reason.¹⁴⁸ “We do not think,” the Bar stated, “that the Rules of Professional Conduct require lawyers to choose between their personal safety or compliance with the law, on the one hand, and maintenance of their bar licenses, on the other.”¹⁴⁹ Opinion 323 ultimately concluded:

Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.¹⁵⁰

The decision of the District of Columbia Bar appears to limit the use of covert or undercover activity to those working for national security or intelligence services; in a footnote, the Bar concluded that the Opinion was not intended to apply to those attorneys who were working on behalf of a client.¹⁵¹

The Utah Committee also issued an opinion examining the use of undercover work by attorneys.¹⁵² In Opinion 02-05, the Utah Committee determined that the Rules of Professional Conduct did not prohibit such conduct by government lawyers;

[W]e do not believe that [the] rule was intended to prohibit prosecutors or other governmental lawyers from participating in lawful undercover investigations. Nor do we think a distinction should be drawn between prosecutors or other governmental lawyers who supervise the investigative activities of others and those who take part directly in such activities. 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).¹⁵³

Utah has, thus, permitted the use of undercover operations by government lawyers, but not those who are engaged in private practice or who act on behalf of a public interest organization.

147. *Id.* In making this determination, the District of Columbia Bar turned to commentary included within their version of the no-contact provisions of Rule 4.2. *Id.*

148. D.C. Formal Op. 323, *supra* note 142.

149. *Id.*

150. *Id.*

151. *Id.* at n.1.

152. Utah State Bar Ethics Advisory Op. Comm., Formal Op. 02-05 (2002).

153. *Id.*

Iowa neither amended its Rules of Professional Conduct nor issued an advisory opinion; instead, it addressed the issue by way of a comment to Rule 8.4.¹⁵⁴ In this comment, it was made clear that attorneys, of all types, could engage in covert activity:

It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules.¹⁵⁵

The only limitation on the right to engage in subterfuge as part of an investigation is the good faith belief that "unlawful activity has taken place, is taking place, or will take place in the foreseeable future."¹⁵⁶ The allowance in Iowa is nearly identical, in both wording and scope, to the amended rule adopted by Oregon following the decision in *Gatti*.

Although not binding authority, the New York County Law Association ("NYCLA") has also issued an opinion to its members concerning the use of "dissemblance" by investigators in the employ of attorneys.¹⁵⁷ The term "dissemblance," for purposes of Opinion 737, was specifically limited to "misstatements as to identity and purpose made solely for gathering evidence."¹⁵⁸ After analyzing the myriad of decisions made on this topic by professional responsibility and bar associations around the country, the NYCLA concluded:

Non-government attorneys may . . . in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances *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 investigator's conduct that the lawyer is supervising do not otherwise violate the Code [of Professional Conduct] . . . or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.¹⁵⁹

154. IOWA RULES OF PROF'L CONDUCT R. 8.4 cmt.6 (2010).

155. *Id.*

156. *Id.*

157. N.Y. Cnty. Law Ass'n Comm. on Prof'l Ethics, Formal Op. 737 (2007). "Dissemblance was distinguished from such things as dishonesty, fraud, misrepresentation, and deceit by its "degree and purpose." *Id.*

158. *Id.*

159. *Id.*

The opinion was not intended to address either the use of dissemblance by government lawyers or its use by attorneys not working in conjunction with an investigator.¹⁶⁰

Two years later in 2009, the Philadelphia Bar Association also issued an opinion related to the use of ruses by investigators who are acting on behalf of attorneys.¹⁶¹ Opinion 2009-02 specifically dealt with the question of whether an investigator could send a “friend” request to a witness to determine whether their Facebook or MySpace accounts contained evidence related to a case.¹⁶² The Philadelphia Bar Association said that this practice was, under Rule 8.4, unethical.¹⁶³ The use of an investigator in this scenario, the association reasoned, omits a highly material fact: “[T]he third party who asks to be allowed access to the witness’s pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness.”¹⁶⁴ The association further stated:

”The fact that the inquirer asserts he does not know if the witness would permit him if he simply asked in a forthright fashion does not remove the deception. The inquirer could test that by simply asking the witness forthrightly for access. That would not be deceptive and would of course be permissible.”¹⁶⁵

The opinion of the Philadelphia Bar Association does not distinguish between either the type of case involved, or the employ of the attorney.¹⁶⁶

Finally, Vermont has raised questions regarding the ethical use of subterfuge by attorneys. *In re PRB Docket No. 2007-046* involved the issue of secretly taped recordings of witness interviews.¹⁶⁷ Although not directly relevant to that question, the Supreme Court of Vermont also asked the United States Attorney, the Attorney General of Vermont, the Defender General, and Office of Disciplinary Counsel to brief issues “concerning the existence and scope of exceptions to Rules 4.1 and 8.4(c) for prosecuting attorneys and defense attorneys in criminal matters.”¹⁶⁸ Although the Court

160. *Id.* As noted by the NYCLA, the use of sting operations supervised by government lawyers was one of many subjects at issue in *United States v. Parker*, 165 F.Supp.2d 431 (W.D.N.Y. 2001). The *Parker* decision is discussed in greater detail *supra* Part II.

161. Philadelphia Bar Ass’n Prof’l Guidance Comm., Formal Op. 2009-02 (2009).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.* Indeed, the Association commented that it was “aware that there is controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful.” *Id.*

167. *In re PRB Docket No. 2007-046*, 989 A.2d 523 (Vt. 2009).

168. *Id.* at 530.

ultimately deferred the issue to a separate committee for consideration, it noted that:

[T]here may be circumstances in which misrepresentations that facially violate the rules are useful, perhaps even necessary, to the functioning of the law-enforcement and judicial systems. Attorneys general and state's attorneys, as part of that system, may employ such methods themselves, or may direct others to employ them, as they investigate discrimination, consumer fraud, or other crimes.¹⁶⁹

To date, the newly formulated Vermont Committee has not issued any public decision on this matter.

As outlined herein, while a number of jurisdictions, committees, and associations have addressed the use of subterfuge by attorneys, the vast majority, including Arkansas, have not.

VI. CONCLUSION

“There is . . . a need for adaptation of the ethics rules in the Model Rules to the Attorney General and his staff in recognition of the uniqueness of the office, the Attorney General's obligation to protect the public interest, and the Attorney General's statutory obligation to represent the various and sometimes conflicting interests of numerous state agencies.”¹⁷⁰

Arkansas has no authority, whether in the form of rule, opinion, or comment, as to an attorney's ability to be directly or indirectly involved in undercover operations involving the use of deceit. The time has come for this important issue to be addressed. The Court of Appeals of Arkansas has previously stated that “[t]here is . . . a need for adaptation of the ethics rules in the Model Rules to the Attorney General and his staff.”¹⁷¹ The same could also be said for other government organizations in the state: whether police agencies, prosecutor offices, or state agencies, boards, and commissions. Private practitioners and those lawyers working in the public interest field also have an interest in this topic.

In any decision on this matter, important policy questions will need to be addressed. At a minimum, the following will need to be considered: Should attorneys be permitted to directly engage in subterfuge as to identity and purpose as part of case-related investigations? Should attorneys be able to supervise and advise others engaging in such activities? If permitted, should this allowance be extended to both criminal and civil matters?

169. *Id.*

170. *Holloway v. Ark. State Bd. of Architects*, 79 Ark. App. 200, 215, 86 S.W.3d 391, 400 (2002).

171. *Id.*

Should these tactics be open to attorneys in private practice and public interest organizations, as well as government lawyers? Should attorneys be given great deference in their ability to use these tactics, as in Oregon under Opinion 2005-173, or should their employment be limited, as advised by the NYCLA in Opinion 737?

Ultimately, these issues will be decided by the courts, the Arkansas Committee on Professional Conduct, or the Arkansas Bar Association. Despite this, public policy seems to dictate that, at a minimum, government attorneys, whether operating in the criminal or civil system, be permitted to engage in covert activity to enforce the law and protect the public-at-large. As expressed by the Supreme Court of the United States in *Hoffa*, “[t]here are some situations where the law could not adequately be enforced without the employment of some guile or misrepresentation of identity.”¹⁷² The merits of this conclusion cannot be argued.

In the criminal setting, the need for such operations is obvious. Indeed, undercover police work often presents the best opportunity to catch those intent on breaking the law. For example, if a uniformed officer asked to buy a kilo of cocaine from a drug dealer, would the transaction actually take place? Would a known detective be permitted to infiltrate a dangerous criminal organization? The answers are, without any doubt, “no.” Ultimately, any limitation on the ability of federal or state law enforcement agencies to use subterfuge as a means of policing would serve only to damage, and not promote, justice.

The need for government attorneys to use guile in the civil realm is equally clear. Recognizing the need to protect consumers from unconscionable, false, or deceptive acts, the Arkansas General Assembly specifically provided the Consumer Protection Division with the ability to conduct investigations into unlawful activities.¹⁷³ As recognized by courts around the nation: “[U]ndercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof.”¹⁷⁴ Any decision relating to the ethical use of undercover operations involving attorneys should take these matters into account.

Until questions relating to attorney use of subterfuge are addressed and this issue is decided, all attorneys practicing in this state, whether public or private, run the risk of violating the Rules. Their involvement in undercover operations, either directly or indirectly, could have dire consequences. At-

172. *Hoffa v. United States*, 385 U.S. 293, 315 (1966).

173. ARK. CODE ANN. § 4-88-105(d)(3) (2013).

174. *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F.Supp.2d 119, 124 (S.D.N.Y. 1999).

torneys are, thus, advised to carefully consider this issue to determine whether the risk of such a practice is worth the reward it may bring.