DECEPTIVE LAWYERING

*Douglas R. Richmond**

I. INTRODUCTION

William Neal killed several women with a wood splitting maul and raped another.[1] He spoke by phone with a sheriff's deputy shortly thereafter, alternating between threats to kill more people if given the chance and offering to surrender if he could talk to a lawyer first.[2] In what must have seemed like a good idea at the time, Deputy District Attorney Mark Pautler, who was present during these telephone negotiations, posed as public defender "Mark Palmer" to obtain Neal's peaceful surrender.[3] Pautler never revealed his deception to anyone outside the District Attorney's office. Unfortunately, Neal resented the deception when he finally learned of it, and Pautler's tactic caused Neal to so mistrust his real public defender that he discharged the public defender and forged on pro se.[4] Neither a lawyer nor a good trial strategist, Neal pled guilty to three first-degree murder charges, represented himself in the subsequent death penalty proceeding, and was sentenced to death.[5] The Colorado Supreme Court sanctioned Paulter for deceiving Neal by suspending him from practice for three months, but stayed the suspension during a one-year probation on the conditions that he complete twenty hours of continuing legal education on ethics and retake the Multistate Professional Responsibility Examination.[6] Although certainly better than a death sentence, this was still a significant sanction under the circumstances.

Lawyers' attempts to deceive people rarely arise out of situations as intense or extreme as Pautler's,[7] but courts abhor even relatively benign

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1. *In re* Pautler (*Pautler II*), 47 P.3d 1175, 1176–77 (Colo. 2002).

2. People v. Pautler (*Pautler I*), 35 P.3d 571, 576 (Colo. 2001).

3. *Id.*

4. *Id.* at 577.

5. *Id.*

6. *Pautler II*, 47 P.3d at 1178, 1184.

7. Sadly, sometimes they are more outrageous. Three Massachusetts lawyers launched a sting operation designed to develop proof of a judge's bias by tricking the judge's law clerk into revealing incriminating information and then essentially blackmailing him. *See* Special Hearing Officer's Hearing

acts of deception. The New Hampshire Supreme Court observed: "Because 'no single transgression reflects more negatively on the legal profession than a lie,' it is the responsibility of every attorney at all times to be truthful."[8] As a rule, noble motives do not excuse lawyers' dishonesty, although they may mitigate associated professional discipline.[9] But should that always be the case, or are some deceptive practices justified, so that lawyers may engage in them without fear of professional discipline or court-imposed sanctions? That question must be affirmatively answered at least some of the time, because litigants and others who are looking to gather favorable evidence often engage in surreptitious discovery and covert investigation.

This Article briefly examines some applicable ethics rules in Part II. Part III discusses two common forms of deceptive lawyering. Section A analyzes lawyers' misrepresentation of their identities and employment of undercover operatives to obtain information about actual or potential adversaries. Section B discusses lawyers' secret recording of conversations, a subject that courts and state ethics committees have long debated with inconsistent results.[10] The Article concludes in Part IV that states should amend their ethics rules to address attorneys' undercover investigations, and that existing ethics rules adequately regulate attorneys' surreptitious recording of conversations.

II. APPLICABLE ETHICS RULES

Surreptitious discovery and covert investigations conducted by lawyers or at their direction implicate several ethics rules.[11] Chief among them is Model Rule of Professional Conduct 8.4(c), which states that it is "professional misconduct" for a lawyer to "engage in conduct

Report, Commw. of Mass. Bd. of Bar Overseers of the Supreme Judicial Court, BBO File Nos. C1-97-0602, C1-97-0589, C1-97(9)589 (May 11, 2005), *available at* http://www.mass.gov/obcbbo/highlit.htm; *see also* Jonathan Saltzman & Ralph Ranelli, *Disbarment Urged for 3 In Scheme*, BOSTON GLOBE, May 13, 2005, 2005 WLNR 7566586.

8. *In re* Kalil's Case, 773 A.2d 647, 648 (N.H. 2001) (quoting *In re* Nardi's Case, 705 A.2d 1199 (N.H. 1998)); *see also* Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186, 1193 (Pa. 1994) ("Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth.").

9. *Pautler II*, 47 P.3d at 1180 (citing People v. Reichman, 819 P.2d 1035, 1039 (Colo. 1991)).

10. Kathleen Maher, *Tale of the Tape: Lawyers Recording Conversations*, PROF. LAW., No. 15-3, 10 (2004).

11. Although beyond the scope of this Article, lawyers engaging in surreptitious discovery and covert investigations must also mind their related disclosure obligations, if any, under Federal Rule of Civil Procedure 26 and state equivalents. *See* FED. R. CIV. P. 26 (stating general provisions governing discovery and duty of disclosure).

involving, dishonesty, fraud, deceit or misrepresentation."[12] In the few jurisdictions still following the Model Code of Professional Responsibility, DR 1-102(A)(4) states that a lawyer "shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."[13] Because these rules use identical language, cases interpreting Rule 8.4(c) are persuasive authority in states adhering to DR 1-102(A)(4), and vice versa.[14]

Model Rule 4.1(a) also addresses lawyers' dishonesty. It provides that, in the course of representing a client, "a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."[15] A fact or point of law is "material" if it is "essential" or "significant."[16] The Model Code counterpart, DR 7-102(A)(5), is stricter because it simply prohibits knowingly false statements of law or fact; it contains no materiality requirement.[17] Under either rule a lawyer's statement is "false" if it is "contrary to fact."[18] These rules do not require criminal intent to deceive, as in cases of perjury or forgery, to justify discipline.[19]

Lawyers who surreptitiously record conversations with witnesses or others must be sure that their conduct does not violate wiretapping or eavesdropping laws. The violation of such laws would be grounds for discipline under Model Rule 4.4(a)'s prohibition on using "methods of obtaining evidence that violate the legal rights" of third persons.[20] In jurisdictions still adhering to the Model Code, lawyers who violate wiretapping or eavesdropping laws also violate DR 7-102(A)(8), which prohibits lawyers from engaging in "other illegal conduct."[21]

Lawyers must mind their obligations under Model Rule 5.3 when conducting surreptitious discovery or covert investigations through

12. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2004).

13. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(4) (1986).

14. Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 317 (2004).

15. MODEL RULES, *supra* note 12, at R. 4.1(a).

16. BLACK'S LAW DICTIONARY 991 (7th ed. 1999).

17. MODEL CODE, *supra* note 13, at DR 7-102(A)(5) ("In his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact.").

18. *See* United States v. Kojayan, 8 F.3d 1315, 1322 (9th Cir. 1993) (defining and contrasting "false" and "misleading" statements).

19. *See, e.g.*, *In re* Belding, 589 S.E.2d 197, 200 (S.C. 2003) (rejecting lawyer's argument that he did not violate Rule 4.1 by preparing false documents because he lacked the intent to commit criminal forgery under South Carolina law).

20. MODEL RULES, *supra* note 12, at R. 4.4(a); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422, at 5–6 (2001) (stating that surreptitious taping that violates wiretapping laws also violates Rule 4.4).

21. MODEL CODE, *supra* note 13, at DR 7-102(A)(8).

agents, such as investigators and legal assistants. For example, Rule 5.3(b) provides that "a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[22] Lawyers are "completely responsible" for the work of nonlawyers who assist them.[23] Legal assistants and investigators must receive "appropriate instruction and supervision concerning the ethical aspects of their employment," and the supervising lawyer must ensure that they understand these ethical limitations.[24]

Of course, lawyers may direct surreptitious discovery activities at people and entities represented by counsel.[25] Doing so implicates Model Rule 4.2, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[26]

Two points about Rule 4.2 merit special attention. First, a lawyer cannot circumvent the rule by directing another person to communicate with a represented party.[27] Second, the rule does not protect a person's right to counsel; it protects counsel's right to be present during any communications between her client and opposing counsel.[28] In this way the rule protects the client against overreaching and unfair tactics by the opposing lawyer making the communication,[29] as well as against harm resulting from the client's ill-advised statements.[30] Thus, a client cannot consent to ex parte communications with opposing counsel,[31] and a

22. MODEL RULES, *supra* note 12, at R. 5.3(b).

23. *In re* Comish, 889 So. 2d 236, 245 (La. 2004).

24. *Id.*

25. *See, e.g.*, Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003) (affirming sanctions against lawyers who employed investigator to surreptitiously tape record conversations with parties' employees).

26. MODEL RULES, *supra* note 12, at R. 4.2.

27. *See, e.g.*, *In re* Complaint of PMD Enters., Inc., 215 F. Supp. 2d 519, 529 (D.N.J. 2002) (revoking pro hac vice admission of lawyer who attempted to circumvent Rule 4.2 through investigator); *In re* Pyle, 91 P.3d 1222, 1228–29 (Kan. 2004) (finding Rule 4.2 violation where attorney had client deliver affidavit to opposing party).

28. State v. Miller, 600 N.W.2d 457, 464 (Minn. 1999).

29. *See* Askins v. Colon, 608 S.E.2d 6, 9 (Ga. Ct. App. 2004) (quoting Sanafill of Ga., Inc. v. Roberts, 502 S.E.2d 343 (Ga. 1998)).

30. MODEL RULES, *supra* note 12, at R. 4.2 cmt. 1.

31. United States v. Lopez, 4 F.3d 1455, 1461–62 (9th Cir. 1993) (discussing federal court equivalent of Rule 4.2); Blanchard v. EdgeMark Fin. Corp., 175 F.R.D. 293, 301–02 (N.D. Ill. 1997); Faison v. Thornton, 863 F. Supp. 1204, 1213 (D. Nev. 1993) (discussing Nevada counterpart to Model Rule 4.2); *Miller*, 600 N.W.2d at 464.

lawyer may violate Rule 4.2 if a represented party initiates the contact.[32]

Model Rule 4.2 is sometimes difficult to apply to organizational litigants.[33] Because an organization functions only through its members, the issue is which people occupy positions or play roles sufficient to personify the organization itself.[34] Courts typically look to the commentary to the rule when trying to decide which members are off limits to opposing counsel. The commentary to Rule 4.2 long provided:

> In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a [1] managerial responsibility on behalf of the organization, and [2] with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or [3] whose statement may constitute an admission on the part of the organization.[35]

The commentary to Rule 4.2 was significantly revised in 2002 as part of the ABA's Ethics 2000 initiative,[36] and it now provides:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[37]

At least one court has deemed this new approach inappropriate.[38]

The Model Code addresses ex parte communications in DR 7-104(A)(1), which provides that in representing a client a lawyer shall not

32. Pleasant Mgmt., LLC v. Carrasco, 870 A.2d 443, 446 (R.I. 2005).

33. Organizational litigants take many forms. *See* State *ex rel.* Pitts v. Roberts, 857 S.W.2d 200, 201 n.2 (Mo. 1993) (identifying corporations, partnerships, sole proprietorships, and not-for-profit entities as types of organizational litigants).

34. It may be especially difficult for a lawyer to determine which employees are off limits in smaller organizations, which may not have hierarchical structures and which may spread management responsibilities among employees. *See* EEOC v. HORA, Inc., No. CIV. A. 03-CV-1429, 2005 WL 1387982, at **11–12 (E.D. Pa. June 8, 2005) (relying principally on Rule 4.2 to disqualify a lawyer who cultivated a relationship with a "mole" inside the defendant organization; employee with whom lawyer communicated did not hold a managerial position, but "occupied a position central to mangement operations given the fact that she was the sole assistant to the most senior managers responsible for the [defendant's] day-to-day operations").

35. MODEL RULES, *supra* note 12, at R. 4.2 cmt. 4 (2001).

36. *See* AM. BAR ASS'N, THE 2002 CHANGES TO THE ABA MODEL RULES OF PROF'L CONDUCT 81–82 (2003) (showing changes to Rule 4.2 and its comments).

37. MODEL RULES, *supra* note 12, at R. 4.2 cmt. 7.

38. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237, 1248 (Nev. 2002) (opting instead to apply a "managing-speaking agent test" under which "the inquiry is whether the employee can bind the organization with his or her statement").

"[c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."[39] Although DR 7-104(A)(1) refers to communications with a "party" rather than with a "person," its application is not limited to parties in litigation; rather, it prohibits nonconsensual ex parte communications with *any* represented person.[40]

Like Rule 4.2, only the lawyer has the right to invoke DR 7-104(A)(1); the rule is not waived simply because a represented party consents to or initiates the communication.[41] DR 7-104(A)(1), like Rule 4.2, protects the client against overreaching by the lawyer making the undisclosed communication as well as against harm attributable to statements made without the benefit of counsel; the rule also applies no matter how brief or innocuous the communication may be.[42] Again as with Rule 4.2, a lawyer cannot circumvent DR 7-104(A)(1) by directing another person to make a communication that the lawyer is prohibited from making.[43]

More generally, Rule 8.4(a) states that to "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" constitutes professional misconduct.[44] DR 1-102(A)(2) similarly states that a lawyer shall not "[c]ircumvent a Disciplinary Rule through actions of another."[45] These rules, which prohibit lawyers from using nonlawyer agents to do what the lawyer cannot do directly, are important to ethical litigation practice. They apply to lawyers' employment of undercover investigators, and to lawyers' use of legal assistants and secretaries for investigative functions.

Finally, lawyers' surreptitious discovery activities and investigations may run afoul of the prohibitions on conduct "prejudicial to the administration of justice" found in Model Rule 8.4(d) and DR 1-102(A)(5).[46] A lawyer's conduct is "prejudicial to the administration of

39. MODEL CODE, *supra* note 13, at DR 7-104(A)(1).

40. Monceret v. Bd. of Prof'l Responsibility, 29 S.W.3d 455, 460 (Tenn. 2000).

41. *Id.* at 461.

42. *In re* Conduct of Knappenberger, 108 P.3d 1161, 1164 (Or. 2005).

43. *See, e.g.*, Meachum v. Outdoor World Corp., 654 N.Y.S.2d 240, 245–50 (N.Y. Sup. Ct. 1996) (disqualifying lawyer and denying class certification where lawyer orchestrated client's call to adversary); Trumbull County Bar Ass'n v. Makridis, 671 N.E.2d 31, 32 (Ohio 1996) (reprimanding lawyer who directed client to call adverse party).

44. MODEL RULES, *supra* note 12, at R. 8.4(a).

45. MODEL CODE, *supra* note 13, at DR 1-102(A)(2).

46. MODEL RULES, *supra* note 12, at R. 8.4(d); MODEL CODE, *supra* note 13, at DR 1-102(A)(5).

justice" if it "bears directly on a case in the judicial process with respect to an identifiable case or tribunal" and "taints the judicial process in more than a *de minimis* way."[47] A lawyer may violate Rule 8.4(d) or DR 1-102(A)(5) through conduct that has the potential to seriously and adversely affect the judicial process; actual impairment or harm is not required.[48] A lawyer's purely private conduct may be prejudicial to the administration of justice if it "is criminal or so egregious as to make the harm, or potential harm, flowing from it patent."[49]

III. COMMON FORMS OF DECEPTIVE LAWYERING

A. Undercover Activities

The use of undercover operatives—which is widely understood and accepted in criminal investigations—is also common in civil cases. For example, members of the American Society of Composers, Authors and Publishers (ASCAP) use "spies" to gather evidence for copyright infringement actions.[50] ASCAP spies visit bars and restaurants to find music being played in violation of copyright protections.[51] The investment firm Merrill Lynch allegedly employed the president of the National Organization of Women to meet with the firm's female employees, some of whom were plaintiffs in a class action against the firm, "to share their complaints and suggestions for improving the firm without disclosing that she was working for Merrill."[52] Employment and housing applicants who think they were denied opportunities because of illegal discrimination use elaborately disguised "discrimination testers" to investigate the offending entity.[53] Lawyers seeking to protect their clients' trademarks dispatch investigators posing as customers to distributors' showrooms and warehouses to gather evidence of the "palming off" or "passing off" of substitute goods.[54]

47. *In re* Hallmark, 831 A.2d 366, 374 (D.C. 2003).

48. *See In re* Uchendu, 812 A.2d 933, 941 (D.C. 2002).

49. Attorney Grievance Comm'n v. Link, 844 A.2d 1197, 1211–12 (Md. 2004).

50. Tom Schoenberg, *A Spy Mission With A Two-Drink Minimum*, LEGAL TIMES, Aug. 30, 2004, at 1, 7.

51. *See id.* at 7.

52. Emily Thornton, *Fed Up—and Fighting Back*, BUS. WK., Sept. 20, 2004, at 100, 101.

53. 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, 793 (1995).

54. *See, e.g.*, Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 119–21 (S.D.N.Y. 1999).

In addition to employing undercover investigators, lawyers themselves may conceal or misrepresent their identities to gather information.[55] This is most easily and most often done over the telephone. For example, a lawyer might pose as a consumer or vendor when calling a company to investigate its allegedly unlawful sales practices.[56] Lawyers might also direct their secretaries, legal assistants, or junior lawyers in their firms to do the same thing.

1. Civil Litigation: Undercover Investigators

Midwest Motor Sports v. Arctic Cat Sales, Inc.[57] illustrates the risks accompanying lawyers' employment of undercover investigators. This case arose out of a dispute between a snowmobile manufacturer, Arctic Cat, and two Arctic Cat dealers, Elliott and A-Tech. Elliott sued Arctic Cat for violating South Dakota franchise law in terminating Elliott's franchise and establishing A-Tech as a new franchisee in the same city. Arctic Cat's attorneys, Roger Damgaard and Timothy Shattuck, retained a private investigator, Timothy Mohr, to visit Elliott's showroom. The purpose of the visit was to determine what products Elliott's sales force was promoting, what products were on display, what brands of snowmobiles were selling best, and whether Elliott was suffering financially from the loss of the Arctic Cat franchise.[58] Mohr wore a hidden recording device to memorialize his conversations with Elliott personnel.[59]

Damgaard and Shattuck did not give Mohr a script of what to ask during his showroom visits, but they did indicate subjects that they wanted him to address.[60] When Mohr asked them whether he could legally record conversations with represented parties, they assured him that his conduct was legal but did not discuss its ethical implications with him.[61]

Mohr twice visited the Elliott showroom posing as a customer and recorded his conversations with an Elliott salesman.[62] Mohr also visited

55. *See, e.g.*, *In re* Conduct of Gatti, 8 P.3d 966 (Or. 2000) (involving lawyer who identified himself as a chiropractor in effort to gather evidence of fraud).

56. *See, e.g.*, Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 462 (D.N.J. 1998) (involving lawyer investigating sales practices allegedly violating a consent decree).

57. 347 F.3d 693 (8th Cir. 2003).

58. *Id.* at 695.

59. *Id.*

60. *Id.* at 695–96.

61. *Id.*

62. *Id.*

the A-Tech showroom, where he met with A-Tech's president, Jon Becker, and recorded the conversation.[63] Again, Mohr knew of the lawsuit between Arctic Cat, Elliott, and A-Tech, and he further knew that Elliott and A-Tech were represented by counsel. He did not, however, reveal to Elliott or A-Tech why he was visiting their showrooms, or that he was wearing a recording device.[64] At the same time, Arctic Cat's attorneys served Elliott and A-Tech with requests to inspect, photograph, and videotape their dealerships pursuant to Federal Rule of Civil Procedure 34.[65]

Elliott and A-Tech sought sanctions against Arctic Cat for Mohr's clandestine activities. The U.S. District Court for the District of South Dakota sanctioned Arctic Cat by excluding Mohr's audio recordings and any evidence gleaned from those recordings.[66] On appeal, the main issues were whether Arctic Cat's counsel violated Rule 4.2 and, more particularly, whether Mohr spoke with anyone at Elliott or A-Tech who played a role sufficient to personify either entity.[67] Arctic Cat conceded that Mohr had spoken with A-Tech's president, Becker.[68] Damgaard and Shattuck attempted to deflect responsibility to Mohr, asserting that they directed him to speak only to low-level sales people for the purpose of becoming familiar with Arctic Cat products, but the U.S. Court of Appeals for the Eighth Circuit was not satisfied:[69]

> Even if these factual assertions were true, lawyers cannot escape responsibility for the wrongdoing they supervise by asserting that it was their agents, not themselves, who committed the wrong. Although Arctic Cat's attorneys did not converse with Becker themselves, the Rules also prohibit contact performed by an investigator acting as counsel's agent. *See* Model Rules of Prof'l Conduct R. 5.3. "Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 ("[I]f the investigator acts as the lawyer's 'alter ego,' the lawyer is ethically responsible for the investigator's conduct."). In other words, an attorney is responsible for the misconduct of his nonlawyer employee or associate if the lawyer orders or ratifies the conduct. Model Rules of Prof'l Conduct R. 5.3. Accordingly, we

63. *Id*.
64. *Id.*
65. *Id.*
66. *Id.* at 697.
67. *Id.* (quoting Model Rule 4.2 and its commentary).
68. *Id.* at 697–98.
69. *Id.* at 698.

> conclude that Arctic Cat's attorneys are ethically responsible for Mohr's conduct in communicating with Becker as if they had made the contact themselves.[70]

The *Midwest Motor Sports* court also was troubled by Mohr's conversations with Elliott's low-level salesman, "Bill," who told Mohr that Elliott had made a business decision to drop the Arctic Cat line—a potentially damaging party admission.[71] Because Elliott's counsel clearly would have advised Bill against making such a statement to Arctic Cat's lawyers, the court had "no doubt" that Rule 4.2 applied to Mohr's conversation with Bill.[72]

Although the Rule 4.2 violations alone supported the trial court's sanctions, the "false and misleading pretenses" under which Mohr visited Elliott and A-Tech further justified the sanctions.[73] Sanctions were appropriate even though South Dakota law permits one party to a conversation to record that conversation without the other party's consent or knowledge.[74] "[C]onduct that is legal may not be ethical," the court observed.[75]

The court reasoned that nonconsensual recordings should be punished where they are accompanied by other indicia of unethical behavior.[76] The egregiousness of the Rule 4.2 violations tipped the scales against Arctic Cat. Furthermore, the "duty to refrain from conduct that involves deceit or misrepresentation should preclude any attorney from participating in the type of surreptitious conduct that occurred here."[77] Arctic Cat employed Mohr in a ruse to gain an advantage at trial, a tactic falling squarely within the Rule 8.4(c) prohibition on "conduct involving dishonesty, fraud, deceit or misrepresentation."[78]

The court also rejected Arctic Cat's defense that it employed Mohr only after traditional means of discovery had failed.[79] According to the court, if Arctic Cat was frustrated by Elliott's or A-Tech's failure to cooperate in discovery, its remedy was a motion to compel discovery, not self-help.[80] Thus, the Eighth Circuit affirmed the district court's order

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 698–99.
74. *Id.* at 699 (citing South Dakota v. Braddock, 452 N.W.2d 785, 788 (S.D. 1990)).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 700.
79. *Id.*
80. *Id.*

excluding Mohr's tapes and any derivative evidence. The court declined to impose monetary sanctions against Arctic Cat or its lawyers.[81]

Midwest Motor Sports certainly is not an aberration. In *In re Ositis*,[82] for example, the Oregon Supreme Court publicly reprimanded a lawyer who directed a private investigator to pose as a journalist to interview a party to a potential dispute.[83] Although not an undercover case in the purest sense, the district court in *Belote v. Maritrans Operating Partners, L.P.*,[84] sanctioned the plaintiff for violating Rule 4.2 after his lawyer's investigator interviewed the captain of the defendant's barge on which the plaintiff was injured.[85] The investigator did not reveal that he was working for the plaintiff until after he completed the interview.[86]

Other courts have embraced litigants' undercover activities as ethical discovery methods.[87] In *Gidatex v. Campaniello Imports, Ltd.*,[88] for example, the plaintiff's lawyers hired private investigators to visit the defendant's business and secretly tape record conversations with salespeople. Gidatex, which owned the furniture trademark "Saporiti Italia," correctly suspected that Campaniello was luring customers with signs and advertisements bearing the Saporiti Italia trademark, and then "palming off" or "passing off" other manufacturers' goods.[89] When Campaniello learned of the ruse, it moved to prevent Gidatex from offering its investigators' testimony and reports as evidence at trial, and also sought to exclude tapes made by the investigators.[90] Campaniello asserted that the evidence should be excluded as a sanction for associated ethics violations by Gidatex's counsel.[91]

Campaniello alleged that Gidatex's attorneys had violated New York DR 7-102(A)(4), which prohibits attorneys from circumventing disciplinary rules through the actions of another and which also prohibits

81. *Id.* at 701.

82. 40 P.3d 500 (Or. 2002).

83. *Id.* at 504–05.

84. No. CIV. A. 97-3993, 1998 WL 136523 (E.D. Pa. Mar. 20, 1998).

85. *Id.* at *7.

86. *Id.* at *1.

87. *See, e.g.*, Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002) (finding no Rule 4.2 violation in case involving secret videotaping of gas station employees where plaintiffs alleged that African-American customers had to pre-pay for gas while other customers could pay after fueling); Apple Corps Ltd. v. Int'l Collectors Society, 15 F. Supp. 2d. 456 (D.N.J. 1998) (finding that attorney did not violate New Jersey ethics rules in investigating marketer's compliance with terms of consent decree; secretary and investigators employed by attorney called marketer in effort to purchase goods in violation of consent decree).

88. 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

89. *Id.* at 120.

90. *Id.* at 119.

91. *Id.* at 119–20.

"conduct involving dishonesty, fraud, deceit or misrepresentation."[92] Campaniello similarly alleged violations of New York DR 7-104(A)(1), which generally prohibits ex parte communications with represented parties.[93] The court rejected both claims, stating:

> These ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover [investigator] 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. Furthermore, excluding evidence obtained by such investigators would not promote . . . preservation of the attorney/client privilege.[94]

The court found that, rather than being unprofessional, "hiring investigators to pose as consumers is an accepted investigative technique."[95] This is especially true in trademark cases, where it is often impossible to discover or prove anti-competitive activity by any other means.[96] Moreover, there was no evidence of unfair conduct by the investigators. They did not interview Campaniello's sales clerks or "trick them into making statements that they otherwise would not have made."[97] To the contrary, they merely recorded Campaniello's normal business practices.[98]

Finally, the court noted that Gidatex's attorneys were alleged to have violated disciplinary rules rather than statutes.[99] Courts are free to admit evidence obtained by unethical means; the admissibility of evidence and the means by which it is obtained are separate issues.[100] Because precluding the evidence would not have served the public interest or promoted the goals of the New York disciplinary rules, the court denied Campaniello's motion.[101]

2. Civil Litigation: Lawyers Concealing Their Identities

Instead of employing undercover investigators, some lawyers conceal

92. *Id.* at 121.
93. *Id.*
94. *Id. at* 122.
95. *Id.*
96. *Id.* at 124.
97. *Id.* at 126.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

their own identities to gather evidence for potential claims or defenses. *In re Gatti* is an illustrative case.[102] There, Oregon lawyer Daniel Gatti suspected that State Farm Insurance Company and CMR, a medical review company that employed chiropractors to evaluate bodily injury claims, were scheming to unfairly deny benefits to injured claimants.[103] In May 1994, Gatti received a copy of a CMR report concerning one of his clients that was signed by a chiropractor named Becker. Gatti believed that State Farm had denied his client's claim based on Becker's report. Gatti called Becker, identified himself as a chiropractor, and questioned Becker about his qualifications.[104] Becker soon became uncomfortable with Gatti's questioning and ended the call.[105]

Gatti next called Adams, a CMR vice president who directed the company's operations. Gatti introduced himself as a doctor with experience reviewing insurance claims and performing independent medical examinations.[106] Gatti told Adams that he wanted to become involved in CMR's educational programs for insurance adjusters.[107] He also expressed interest in working for CMR, and said that Becker and State Farm had referred him to the company.[108]

Adams believed that Gatti was a chiropractor and that he was a likely candidate for employment with CMR.[109] Adams referred Gatti to Householder, a CMR executive in another office, to discuss employment opportunities. Householder knew that Gatti was a lawyer with no interest in working for CMR.[110]

In June 1994, Gatti's client sued Adams, Becker, Householder, and CMR for fraud and tortious interference with contractual relations. In July 1994, Adams filed a disciplinary complaint against Gatti with the Oregon State Bar. The Bar charged Gatti with violating DR 1-102(A)(3) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 7-102(A)(5) (knowingly making false statements of law or fact), and an Oregon statute prohibiting willful deceit or misconduct in the legal profession.[111] The case ultimately reached the Oregon Supreme Court.

102. 8 P.3d 966 (Or. 2000).
103. *Id.* at 969–70.
104. *Id.* at 970.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 973–74.

Gatti clearly violated the letter of the general rules stated in both DR 1-102(A)(3) and DR 7-102(A)(5).[112] Gatti, however, advocated an "investigatory exception" to the disciplinary rules.[113] He proposed that "as long as misrepresentations are limited only to identity or purpose and [are] made solely for purposes of discovering information, there is no violation of the Code of Professional Responsibility."[114] According to Gatti, this exception was "necessary if lawyers in private practice, like their counterparts in the government, are to be successful in their efforts to 'root out evil.'"[115]

The trial panel Gatti appeared before refused to recognize an exception to the rules or statute either for government lawyers or for private practitioners, reasoning that the disciplinary rules applied to all Oregon lawyers without exception.[116] On appeal, the United States Attorney for the District of Oregon and the Oregon Attorney General weighed in as amici, arguing that government attorneys supervising legitimate law enforcement activities involving deception or covert activities should not be held in violation of DR 1-102(A)(3).[117] A number of Oregon consumer groups also appeared as amici, arguing that private practitioners should be allowed to ethically engage in covert activities "for the purpose of rooting out fraud and illegality."[118] Resolving that a "clear answer . . . regarding exceptions to the disciplinary rules [was] in order,"[119] 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, [an Oregon statute] provides that the rules of professional conduct "shall be binding upon *all* members of the bar." (Emphasis added.) Faithful adherence to the wording of DR 1-102(A)(3), DR 7-102(A)(5), ORS 9.527(4), and this court's case law does not permit an exception for *any* lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements. In our view, this court should not create an exception to the rules by judicial

112. *Id*.
113. *Id.* at 974.
114. *Id*.
115. *Id.*
116. *Id.*
117. *Id.* at 974–75.
118. *Id.* at 975.
119. *Id.* at 976.

> decree. Instead, any exception must await the full debate that is contemplated by the process for adopting and amending the Code of Professional Responsibility. . . . We decline to adopt an exception to DR 1-102(A)(3) and DR 7-102(A)(5), and we are without authority to read into ORS 9.527(4) an exception that the statute does not contain. *Those disciplinary rules and the statute apply to all members of the Bar, without exception.*[120]

The court ultimately decided on a public reprimand as appropriate discipline.[121] In doing so, it noted that many lawyers mistakenly believe that they can misrepresent their identities and purposes to obtain information, such that it was happenstance that Gatti, and not some other Oregon lawyer, was the subject of these proceedings.[122]

In response to the *In re Gatti* decision,[123] Oregon adopted DR 1-102(D), which provides:

> Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), 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 disciplinary rules. "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 foreseeable future.[124]

The new Oregon rule does not permit lawyers to participate directly in covert activities; they are limited to advising on and supervising the covert activities of others.[125]

3. Criminal Cases

Although once the subject of considerable controversy and debate,[126] it is now settled that government lawyers, including federal prosecutors,

120. *Id.* (latter emphasis added).

121. *Id.* at 980.

122. *Id.* at 979.

123. Or. Eth. Op. 2003-173, 2003 WL 22397289, at *2 (Or. St. Bar Ass'n 2003).

124. *Id.* (quoting rule).

125. *Id.* at **4–5.

126. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 4.2-3, at 772–75 (2005–2006) (discussing United States Attorney General's unsuccessful efforts to exempt federal prosecutors from Rule 4.2).

are bound to obey Rule 4.2 and DR 7-104(A)(1).[127] Like private attorneys, government lawyers cannot bypass inconvenient ethics rules by directing nonlawyer agents to do for them that which they cannot do directly. Nonetheless, Rule 4.2 and DR 7-104(A)(1) do "not prevent non-custodial pre-indictment communications by undercover agents with represented parties which occur in the course of legitimate criminal investigations."[128] Accordingly, government attorneys do not violate these rules by supervising such investigations.

Similarly, government lawyers may supervise lawful covert activities involving deception and misrepresentation by law enforcement personnel to gather information without violating Rule 8.4(c) or DR 1-102(A)(4).[129] Law officers who are licensed attorneys—as many FBI agents are—may engage in lawful covert activities that gather information through dishonesty, deceit, and misrepresentation without running afoul of Rule 8.4(c) and DR 1-102(A)(4).[130] The former situation was addressed in *United States v. Parker*, where the defendants in an alleged drug conspiracy sought to exclude evidence obtained in an undercover "sting" operation by arguing that the government attorneys supervising the investigation violated DR 1-102(A)(4).[131] The *Parker* court gave the defendants' argument short shrift:

> Defendants' 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

127. United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1253–57 (8th Cir. 1998) (applying Missouri version of Rule 4.2); *In re* Howes, 940 P.2d 159, 165–69 (N.M. 1997) (applying New Mexico equivalent to Rule 4.2).

128. United States v. Grass, 239 F. Supp. 2d 535, 541 (M.D. Pa. 2003); *see also* United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996) (finding no "party" for purposes of New Jersey Rule 4.2 and further applying "authorized by law" exception to rule); United States v. Ryans, 903 F.2d 731, 734–40 (10th Cir. 1990) (holding "that DR 7-104(A)(1)'s proscriptions do not attach during the investigative process before the initiation of criminal proceedings;" the target had been served with a grand jury subpoena, but "had not been charged, arrested or indicted," or otherwise faced with prosecutorial forces).

129. *See, e.g.*, Utah Eth. Op. 02-05, 2002 WL 459018, at *1 (Utah State Bar Mar. 18, 2002) ("A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.").

130. D.C. Bar Legal Ethics Comm., Op. 323, at 4 (Mar. 29, 2004), *available at* http://www.dcbar.org (visited Sept. 23, 2004) ("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."); Utah Eth. Op. 02-05, *supra* note 129, at **3–4 (discussing Rule 8.4(c)).

131. 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001).

dangerous. There is no authority for such a conclusion.[132]

In both instances, however, any Rule 8.4(c) and DR 1-102(A)(4) exception for government lawyers is a narrow one.[133] Government lawyers who engage in illegal or unlawful conduct might violate these rules,[134] and they certainly do not have blanket permission to misrepresent themselves or to ignore other legal duties compelling honesty.[135]

As for government lawyers misleading people about their identities when acting in representational roles, courts' intolerance is evidenced by the decision of *In re Pautler*,[136] where Colorado prosecutor Mark Pautler posed as a public defender to secure a murderer's surrender. Responding to Pautler's defense that the circumstances justified his departure from Colorado Rule of Professional Conduct 8.4(c), which prohibits lawyers from engaging "'in conduct involving dishonesty, fraud, deceit or misrepresentation,'"[137] the Colorado Supreme Court explained that "[t]his rule and its commentary are devoid of any exception."[138] Colorado ethics rules do not "distinguish lawyers working in law enforcement from other lawyers, apart from additional responsibilities imposed upon prosecutors."[139] Pautler's purposeful deception was "intolerable," regardless of his motives.[140]

4. Analysis

Looking first at attorneys' employment of undercover investigators in civil cases, lawyers face very practical problems. For example, when a lawyer investigates before filing suit, it may be difficult for her to know whether the target of her investigation is represented by counsel in the matter.[141] In cases involving organizational litigants, lawyers cannot necessarily avoid problems by instructing investigators to speak only with low-level employees, because contact with even low-level

132. *Id.* at 476–77.

133. *See* D.C. Op. 323, *supra* note 130, at 4 (discussing scope of Rule 8.4 exception); Utah Eth. Op. 02-05, *supra* note 129, at *4 (same).

134. Utah Eth. Op. 02-05, *supra* note 129, at *4.

135. D.C. Op. 323, *supra* note 130, at 4.

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

137. *Id.* at 1179 (quoting COLO. R. PROF'L CONDUCT 8.4(c)).

138. *Id.*

139. *Id.* (citations omitted)

140. *Id.* at 1176.

141. Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 125 (S.D.N.Y. 1999) ("Typically, before a complaint is filed, there is uncertainty as to whether a party is represented . . ."); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 126, § 4.2-1, at 765–66 (noting this problem).

employees may be off limits in some jurisdictions if the employees' acts or omissions can be imputed to the organization, or if they can bind the organization through their admissions.[142] Investigators may also inadvertently speak to employees with whom ex parte communication clearly is forbidden.[143]

Although it is tempting to say that lawyers "probably can employ persons to play the role of customer seeking services on the same basis as the general public,"[144] cases such as *Midwest Motor Sports* indicate a different conclusion.[145] Moreover, many cases approving lawyers' use of undercover investigators are district court decisions and therefore are not controlling precedent.[146] If any statement about lawyers' use of undercover investigators is certain, it is that courts should not penalize lawyers' Rule 4.2 or DR 7-104(A)(1) violations by excluding wrongfully obtained evidence.[147] If a lawyer violates Rule 4.2 through the use of undercover investigators, the aggrieved party's appropriate remedy is to complain to disciplinary authorities.[148] Alternatively, on the right facts the court might properly disqualify the offending lawyer. An exclusionary policy, on the other hand, "frustrates truth and does not punish the ethical violation. Instead, it works against the client who may have been wronged by the opposing party as far as the substantive claim is concerned."[149]

For all the problems that Rule 4.2 and DR 7-104(A)(1) pose in undercover investigations in civil cases, their limits are easy to understand; the facts of particular cases may never implicate them. For example, the party being investigated may not be represented in the matter, or the employees of an organizational party to whom an investigator speaks may not fall into any protected class, and so on.

142. *See* Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878–79 (N.D. Ill. 2002).

143. *See, e.g.*, Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 696 (8th Cir. 2003) (involving undercover investigator who was approached by party's owner when the investigator entered the showroom of the party's business).

144. *Hill*, 209 F. Supp. 2d at 880.

145. *See Midwest Motor Sports*, 347 F.3d 693.

146. *See* FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002) ("The reasoning of district judges is of course entitled to respect, but the decision of a district judge cannot be a controlling precedent.").

147. *See, e.g.*, Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 126 (S.D.N.Y. 1999) (finding that even if DR 7-104(A)(1) were violated, exclusion of evidence obtained through violation would be an inappropriate remedy); Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437, 1442 (D. Colo. 1996) (holding to the same effect under Rule 4.2); Weider Sports Equip. Co. v. Fitness First, Inc., 912 F. Supp. 502, 510–11 (D. Utah 1996) (holding to the same effect under Rule 4.2); Mena v. Key Food Stores Co-op., Inc., 758 N.Y.S.2d 246, 249 (N.Y. Sup. Ct. 2003) (quoting cases).

148. *See Cadillac Plastic Group*, 930 F. Supp. at 1442; *Weider Sports Equip.*, 912 F. Supp. at 511.

149. *Cadillac Plastic Group*, 930 F. Supp. at 1442 (citations omitted).

More difficult to understand is how lawyers' use of undercover investigators does not violate the much broader Rule 8.4(c) and DR 1-102(A)(4), which prohibit lawyers from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation."[150] After all, these rules are devoid of exceptions.[151]

Lawyers who advocate the use of undercover investigators might argue that they do not "engage in" conduct involving dishonesty, fraud, deceit, or misrepresentation when they employ undercover investigators; rather, it is the *investigators* who engage in that conduct. Thus, there is no Rule 8.4(c) or DR 1-102(A)(4) violation. This argument is specious. For one thing, it ignores Rule 8.4(a) and DR 1-102(A)(2), which clearly state that lawyers may not avoid their professional responsibilities by instructing nonlawyer agents to do for them that which they cannot do themselves.[152] For another thing, the argument defies common sense. Undercover investigators do not magically appear in a potential adversary's place of business, nor is their secret taping of an adversary's employees' statements mere fortuity; they perform at lawyers' requests and direction. Undercover investigators would not covertly gather information for use in litigation but for the request of the lawyers employing them. In short, lawyers cannot evade their obligations under Rule 8.4(c) and DR 1-102(A)(4) by assigning responsibility to their investigators.[153]

A better argument is that Rule 8.4(c) and DR 1-102(A)(4) are not intended to apply to lawyers' use of undercover investigators. Courts analyze conduct allegedly constituting dishonesty, fraud, deceit, and misrepresentation on a case-by-case basis.[154] Courts define these terms to embrace characteristics that reflect negatively on lawyers' fitness to practice law.[155] Thus, to violate these rules, "the lawyer's conduct must indicate that the lawyer lacks those characteristics of trustworthiness and

150. MODEL RULES, *supra* note 12, at R. 8.4(c); MODEL CODE, *supra* note 13, at DR 1-102(A)(4).

151. *In re* Pautler (*Pautler II*), 47 P.3d 1179 (Colo. 2002) (discussing COLO. R. PROF'L CONDUCT 8.4(c), which is identical to Model Rule 8.4(c) and DR 1-102(A)(4) in the Model Code).

152. MODEL RULES, *supra* note 12, at R. 8.4(a) (making it "professional misconduct" for a lawyer to "violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another"); MODEL CODE, *supra* note 13, at DR 1-102(A)(2) (stating that a lawyer shall not "[c]ircumvent a Disciplinary Rule through actions of another").

153. *See, e.g.*, *In re* Pajerowski, 721 A.2d 992, 995 (N.J. 1998) (rejecting lawyer's defense that he did not authorize investigator to solicit clients to engage in "gross improprieties"); *In re* Ositis, 40 P.3d 500, 503–04 (Or. 2002) (rejecting lawyer's claim that he did not direct investigator's actions in posing as reporter to interview adversary).

154. *In re* Carpenter, 95 P.3d 203, 208 (Or. 2004) (discussing "dishonesty" and Oregon DR 1-102(A)(3), which is identical to DR 1-102(A)(4) in the Model Code and to Model Rule 8.4(c)).

155. *Id.* at 209.

integrity that are essential to the practice of law."[156] In most cases, a lawyer's employment of undercover investigators does not necessarily indicate that the lawyer is untrustworthy or lacks integrity. Indeed, lawyers sometimes employ undercover investigators in cases advancing laudable societal goals or policy objectives,[157] as where employment or housing "testers" are used to uncover evidence of unlawful discrimination.[158]

This argument, although plausible, is not sure to succeed. Neither Rule 8.4(c) nor DR 1-102(A) explicitly contain an exception for legitimate covert investigations, and some courts hold that noble motives do not justify departures from the rules' clear language.[159] A court weighing the conduct of a lawyer accused of unethically employing undercover investigators could foreseeably decline to craft any exception to these rules, leaving that task to those bodies charged with adopting and amending ethics rules.[160] The lawyer thus ensnared is likely to find little solace in the fact that those found to have acted unethically in connection with covert investigations have not been severely disciplined. After all, light discipline is not guaranteed and responsible lawyers are normally troubled by any possible discipline or sanction. Furthermore, the lawyer risks his disqualification or the exclusion of wrongfully obtained evidence, with the lawyer's client being harmed in either event.

On the right facts, a lawyer might be able to argue against sanctions or discipline on the basis that any misrepresentation carried out by an undercover investigator was immaterial, and therefore the lawyer is not guilty of conduct involving "misrepresentation" within the meaning of Rule 8.4(c). The argument goes something like this. Rule 4.1(a) provides that in the course of representing a client "a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person."[161] An established principle of statutory construction is that

156. *Id.*

157. *See, e.g.*, Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 124 (S.D.N.Y. 1999) (asserting that "enforcement of the trademark laws to prevent consumer confusion is an important policy objective").

158. *See* Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983) (explaining the important role that testers play in race discrimination cases and observing that the deception they employ, while regrettable, is "a relatively small price to pay to defeat racial discrimination").

159. *In re* Pautler (*Pautler II*), 47 P.3d 1179, 1180 (Colo. 2002) (discussing COLO. R. PROF'L CONDUCT 8.4(c), which is identical to the Model Rule).

160. *See, e.g.*, *In re* Gatti, 8 P.3d 966, 976 (Or. 2000) ("In our view this court should not create an exception to the rules by judicial decree. Instead, any exception must await the full debate that is contemplated by the process for adopting and amending the Code of Professional Responsibility.").

161. MODEL RULES, *supra* note 12, at R. 4.1(a).

"the drafters of a statute intended no redundancy, so that a statute should be construed, if possible, to give effect to its entire text."[162] Thus, if Rule 8.4(c) and Rule 4.1(a) are to be harmonized, as they must be, a lawyer's "misrepresentation" violates Rule 8.4(c) only if it is "material."[163] Any other reading of Rule 8.4(c) would render Rule 4.1(a) superfluous.[164]

An undercover investigator's misrepresentations could easily be seen as immaterial. Consider a case in which undercover investigators pose as customers to investigate allegedly unlawful sales practices. The mere fact that the investigators do not reveal their true status or motive to the target's low-level salespeople is not material, since a salesperson's job is to visit with prospective customers.[165] Investigators' inquiries about product availability or features do not constitute material misrepresentations because a salesperson routinely answers such questions in the course of his employment. As long as the investigators do not try to trick salespeople into doing or saying things that they would not normally do or say, their misrepresentations are immaterial and the supervising lawyers do not violate Rule 8.4(c).

This argument may rest on a faulty premise, namely that the failure to read a materiality requirement into the Rule 8.4(c) prohibition on "misrepresentation" renders Rule 4.1(a) superfluous. The commentary to Rule 4.1 suggests that it is not rendered superfluous by the absence of a materiality requirement in Rule 8.4(c). Specifically, the commentary to Rule 4.1 states: "For dishonest conduct that does not amount to a false statement," lawyers should "see Rule 8.4."[166] In other words, while a lawyer's material misrepresentation to a third person necessarily violates both Rule 4.1(a) and Rule 8.4(c), a lawyer may behave deceitfully or dishonestly without ever making a false statement of material fact or law, and thus violate Rule 8.4(c) without implicating Rule 4.1(a). This is consistent with the purpose of Rule 8.4(c), which is "written broadly both to cover a wide array of offensive lawyer conduct and to attempt to prevent attempted technical manipulation of a rule stated more

162. Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 476 (D.N.J. 1998).

163. *Id.*

164. *Id.*

165. *See* Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 122 (S.D.N.Y. 1999) (discussing a plaintiff's use of undercover investigators to visit the defendant's customer showroom to detect trademark violations, and observing that having operated a furniture business for two decades, "surely [the defendant] had come to expect that customers would enter the [defendant's] showroom during business hours, engage in conversation with sales clerks, make inquiries regarding various brands of furniture, and leave without making a purchase").

166. MODEL RULES, *supra* note 12, at R. 4.1 cmt. 1.

narrowly."[167] Of course, none of this matters in Model Code states because DR 7-102(A)(5), the Model Code counterpart to Rule 4.1(a), has no materiality requirement.[168]

In summary, lines cannot be confidently drawn in this area; at best, lawyers must evaluate associated risks on a continuum from "clearly impermissible to clearly permissible conduct."[169] In terms of practical guidance, lawyers considering an undercover investigation should first research the law in their jurisdiction relating to Rule 8.4(c) or DR 1-102(A)(4). If the investigation will take place in a jurisdiction other than that in which the lawyer practices, the lawyer should research the law in both jurisdictions. If a lawyer determines either that there is no law on point or that lawyers may supervise undercover investigations without violating Rule 8.4(c) or DR 1-102(A)(4), the lawyer may have to conduct additional research if the target of the investigation is an organization. If an organization is the target, the lawyer must research Rule 4.2 or DR 7-104(A)(1) to determine which employees are off limits. After that is done, the lawyer is prepared to plan the investigation. That planning must include careful instructions to investigators about to whom they can speak and what they can say. A target's employees should never be tricked into saying or doing things that they would not normally say or do when dealing with actual customers.[170]

As to lawyers misrepresenting their identities to gather information in civil cases, the rule is simple: "Never, Never, Never Lie."[171] Any notion that lawyers may avoid discipline or sanctions for misrepresenting their identities because they are functioning as investigators rather than as lawyers is seriously misguided. First, lawyers cannot simply switch hats as a matter of ethical convenience.[172] Second, lawyers who misrepresent their identities while functioning as investigators are still

167. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. c (2000) (discussing "'catch-all' provisions" in modern lawyer codes).

168. MODEL CODE, *supra* note 13, at DR 7-102(A)(5) (providing that in representing a client, a lawyer shall not "[k]nowingly make a false statement of law or fact").

169. Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002).

170. *See id.* ("Lawyers (and investigators) cannot trick protected employees into doing things or saying things that they otherwise would not do or say."); *Gidatex*, 82 F. Supp. 2d at 126 (finding no ethics violation, the court observed that "Gidatex's investigators did not . . . trick [sales clerks] into making statements they otherwise would not have made").

171. Michael Sean Quinn, *The Eleven Commandments of Professional Responsibility: A Gallimaufry*, *in* TEX. CTR. FOR LEGAL ETHICS & PROFESSIONALISM, THE ETHICS COURSE 184 (4th ed. 2001) ("Commandment Two: Never, Never, Never Lie").

172. *See, e.g.*, *In re* Malone, 482 N.E.2d 565 (N.Y. 1985) (disciplining lawyer for violating DR 1-102(A)(4) while investigating allegations of brutality against inmates in his capacity as Inspector General of the State Department of Correctional Services).

involved in judicial proceedings, either as a precursor to litigation or because litigation is already underway. The lawyer's slightly different role in a judicial proceeding does not change the overall context in which the deception occurs.[173] Third, lawyers may be disciplined for conduct involving dishonesty, fraud, deceit, or misrepresentation even if they are not acting as lawyers at the time because this conduct relates to their ability to practice law.[174] Courts routinely discipline attorneys for dishonest conduct outside their law practices.[175]

In the criminal arena, government attorneys enjoy far greater leeway in undercover investigations than do private lawyers.[176] Government lawyers are, however, still subject to the same absolute prohibition against misrepresenting their identities when functioning in traditional roles.[177]

B. Secret Tape Recording

As case law amply illustrates, undercover investigators working for lawyers typically record conversations.[178] Lawyers may also surreptitiously tape record conversations, such as when they speak with witnesses whom they reasonably believe may later change their stories. "Although many people find surreptitious tape recording to be offensive

173. *See, e.g.*, NYAT Operating Corp. v. Jackson, Lewis, Schnitzler & Krupman, 741 N.Y.S.2d 385 (N.Y. App. Div. 2002) (involving lawyer who allegedly lied in deposition in former clients' case, and rejecting lawyer's argument that she was not subject to claim of deception and collusion because she was not serving as attorney at time of deposition).

174. ROTUNDA & DZIENKOWSKI, *supra* note 126, § 8.4-1, at 1084.

175. *See, e.g.*, Attorney Grievance Comm'n v. Gore, 845 A.2d 1204, 1209–10 (Md. 2004) (finding that lawyer who failed to file and pay sales taxes for restaurant he owned violated Rule 8.4(c) and finding that disbarment was appropriate disciplinary sanction); *In re* Carpenter, 95 P.3d 203, 207, 210 (Or. 2004) (noting that Oregon analog to DR 1-102(A)(3) does not require that lawyer be acting in his or her capacity as a lawyer, and finding that lawyer violated rule by posting message intended as a joke in an online forum; lawyer's dishonest conduct bore functional relationship to his ability to practice law because it caused the court "to question whether the [lawyer] possesses the requisite trustworthiness and integrity to handle important matters involving legal rights that clients commonly entrust to lawyers").

176. *See* Sequa Corp. v. Lititech, Inc., 807 F. Supp. 653, 663 (D. Colo. 1992) ("Law enforcement authorities are afforded license to engage in . . . deceptive acts to detect and prove criminal violations. Private attorneys are not."). Courts recognize that undercover investigations by law enforcement authorities further important public interests in detecting, preventing, and punishing crime. *See* United States v. Murphy, 768 F.2d 1518, 1529 (7th Cir. 1985) (discussing the role of undercover FBI agents posing as attorneys to investigate judicial corruption, the court observed that "[t]he creation of opportunities for crime is nasty but necessary business").

177. *See, e.g.*, *In re* Pautler (*Pautler II*), 47 P.3d 1175 (Colo. 2002).

178. *See, e.g.*, Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003); Gidatex v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999).

as a general matter,"[179] that does not make it unethical.[180] Some courts' and lawyers' distaste for surreptitious tape recording does not necessarily mean that it involves dishonesty, fraud, deceit, or misrepresentation.[181] Indeed, a lawyer's "mere act of secretly but lawfully recording a conversation" is not inherently dishonest or deceitful.[182] Most ethical complications stem from the manner in which lawyers use surreptitious recordings, not the act of recording itself.[183]

The vast majority of states permit surreptitious taping if one party to the conversation, including the recording party, consents.[184] In states with permissive eavesdropping or wiretapping laws, lawyers should be able to secretly tape conversations without violating ethics rules prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation.[185] This is true regardless of whether the attorney is a private practitioner or a prosecutor.[186]

A lawyer's ability to record a conversation without the other person's knowledge or consent does not by extension allow the lawyer to falsely deny that the conversation is being recorded.[187] In *Mississippi Bar v. Attorney ST*, for example, the court held that the attorney violated Rules 4.1 and 8.4(c) when, in the course of surreptitiously tape recording a telephone call, he answered "no" when asked if he was recording the conversation.[188] Although the attorney was taping the conversation to protect his client and his actions to that point were justifiable and ethical,[189] he "stepped over the line" when he "blatantly denied, when asked" whether he was taping the conversation.[190] As the court explained:

179. ROTUNDA & DZIENKOWSKI, *supra* note 126, § 4.4-2(b), at 798.

180. Of course, surreptitious taping by lawyers is unethical if it violates wiretapping or eavesdropping laws. MODEL RULES, *supra* note 12, at R. 4.4(a); MODEL CODE, *supra* note 13, at DR 7-102(A)(8).

181. *See* Bd. of Overseers of the Bar, Prof'l Conduct Comm'n, Op. No. 168, at 5–6 (Me. Mar. 9, 1999) (discussing Maine Bar Rule 3.2(f)(3), which "addresses conduct that involves 'dishonesty, fraud, deceit or misrepresentation'").

182. ABA Formal Op. 01-422, *supra* note 20, at 2.

183. Attorney M v. Miss. Bar, 621 So. 2d 220, 224 (Miss. 1992).

184. ABA Formal Op. 01-422, *supra* note 20, at 4; Todd Mullins & Andrea D. Farinacci, *A Trial Lawyer's Guide to Surreptitious Audio Evidence*, LITIGATION, Spring 2005, at 27 (asserting that thirty-eight states, the District of Columbia, and federal statutes provide that it is lawful to secretly record a conversation so long as one party to the conversation consents).

185. *See, e.g.*, *Attorney M*, 621 So. 2d at 222–25 (applying MISS. R. PROF'L CONDUCT 8.4(c)).

186. *Id.* at 223–24.

187. ABA Formal Op. 01-422, *supra* note 20, at 6.

188. 621 So. 2d 229, 232 (Miss. 1993).

189. *Id.* at 232–33.

190. *Id.* at 233.

> An attorney is not a private detective or a secret agent; he is not acting as an undercover police officer; rather, he is first and foremost an attorney, and his truthfulness must be above reproach. When asked point-blank whether he is mechanically reproducing a conversation, his answer must be truthful. To respond otherwise vitiates all rules of professional conduct.[191]

Of course, not all states permit recording of a conversation with the consent of only one party to the conversation.[192] In some states, recording a conversation without the consent of all parties is prohibited, although legitimate law enforcement activities are usually excepted.[193] In these states, attorneys who surreptitiously record conversations in civil matters violate Rule 8.4(c) and DR 1-102(A)(4).[194] They may also violate myriad other rules,[195] and may face civil and criminal liability.[196] In still other states, surreptitious taping by private attorneys, although "technically legal," may nonetheless be "professionally improper."[197] Courts in these states view surreptitious tape recording by private attorneys as inconsistent with general standards of candor and fairness.[198]

In addition to covertly recording conversations with witnesses and other third persons, lawyers occasionally record conversations with judges without the judges' knowledge or permission.[199] This is always a

191. *Id.*

192. Mullins & Farinacci, *supra* note 184, at 27 (reporting that twelve states require the consent of all parties to a conversation for taping to be permissible).

193. *See, e.g.*, *In re* Attorney General's Petition, 417 S.E.2d 526, 526 (S.C. 1992) (explaining that private attorneys may surreptitiously record conversations "when that recording is made with the prior consent of, or at the request of, an appropriate law enforcement agency in the course of a legitimate criminal investigation").

194. Sequa Corp. v. Lititech, Inc., 807 F. Supp. 653, 663 (D. Colo. 1992) (discussing Colorado law); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217–18 (Iowa 1996); *In re* Nester, 541 S.E.2d 538, 539 (S.C. 2001).

195. *See* MODEL RULES, *supra* note 12, at R. 4.4(a) (stating that in representing a client, a lawyer shall not "use methods of obtaining evidence that violate the legal rights of [a third person]"); *id.* R. 8.4(b) (making it professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"); *id.* R. 8.4(d) (making it professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice"); MODEL CODE, *supra* note 13, at DR 1-102(A)(3) (stating that "a lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude"); *id.* DR 1-102(A)(5) (stating that "a lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice"); *id.* DR 1-102(A)(6) (prohibiting "any other conduct that adversely reflects on [a lawyer's] fitness to practice law"); *id.* DR 7-102(A)(8) (stating that in representing a client "a lawyer shall not . . .[k]nowingly engage in other illegal conduct").

196. ABA Formal Op. 01-422, *supra* note 20, at 5.

197. *In re* Ziegler, 1994 WL 10809, at *1 (Del. Jan. 3, 1994).

198. *See id.* (quoting People v. Selby, 606 P.2d 45, 47 (Colo. 1979)); Gunter v. Va. State Bar, 385 S.E.2d 597, 600 (Va. 1989).

199. *See, e.g.*, *Selby*, 606 P.2d 45; *Plumb*, 546 N.W.2d 215 (recording judge with respect to

terrible idea.[200] Whether the lawyer records the conversation herself or whether she has someone else appearing before the judge (such as a client) do it is immaterial; both tactics are equally impermissible and offensive.[201] The jurisdiction's allowance of surreptitious recording with the consent of one party to the conversation is also irrelevant. A lawyer's duty of candor to a tribunal is a very special responsibility that requires forthrightness and frankness in all communications.[202]

Lawyers contemplating surreptitious recording as a means of gathering evidence or documenting information for their clients' benefit should proceed cautiously. First, they must ensure that they are "informed of the relevant law of the jurisdiction in which the recording occurs."[203] Although most states permit surreptitious recording with one party's consent, the practice draws keen judicial scrutiny even in jurisdictions where it is lawful.[204] In jurisdictions that forbid recording absent the consent of all parties to the conversation, a lawyer's consideration of recording should end with the determination that it is unlawful.

Where multiple jurisdictions are implicated, lawyers must be especially careful to ascertain all relevant law, a point illustrated by *Anderson v. Hale*.[205] A defense attorney in New York recorded a call from a witness in Illinois.[206] New York law permits surreptitious taping with one party's consent; Illinois law does not.[207] The magistrate on the case concluded that the defense attorney acted unethically by recording the call in violation of Illinois law, and found that the lawyer's unethical conduct vitiated the work-product immunity that would have otherwise shielded the recording from discovery by the plaintiff.[208] The district court overruled the defendant's objections to the magistrate's order.[209]

Anderson illustrates another trap for unwary lawyers: federal courts

communication taking place before judge assumed the bench); *In re* Warner, 335 S.E.2d 90 (S.C. 1985) (involving lawyer who had client record judge).

200. *See, e.g.*, *Selby*, 606 P.2d at 47 ("Particularly reprehensible is the unauthorized recording of the private, informal discussions with a judge in chambers."); *Plumb*, 546 N.W.2d at 217 (finding this conduct "especially troubling"); *In re Warner*, 335 S.E.2d at 91 (saying that such conduct brings "discredit upon the legal profession" and further calling it "reprehensible").

201. *In re Warner*, 335 S.E.2d at 91.

202. *See* Richmond, *supra* note 14, at 305–06.

203. ABA Formal Op. 01-422, *supra* note 20, at 6.

204. Federal courts side with states that prohibit surreptitious recording, generally finding that it vitiates any work product immunity otherwise existing in the recording itself. *See infra* notes 212–16.

205. 202 F.R.D. 548 (N.D. Ill. 2001).

206. *Id.* at 551.

207. *Id.* at 558 n.6.

208. *Id.* at 559.

209. Anderson v. Hale, 159 F. Supp. 2d 1116, 1117–18 (N.D. Ill. 2001).

may apply their own standard to surreptitious taping, regardless of eavesdropping or wiretapping laws in the forum state, and separate from state ethics rules.[210] In doing so, they generally follow ABA Formal Ethics Opinion 337,[211] rendered in August 1974 and since superseded,[212] which concluded that as a general rule "conduct which involves dishonesty, fraud, deceit or misrepresentation . . . clearly encompasses the making of recordings without the consent of all parties."[213] The recording lawyer's unethical behavior vitiates any work-product immunity that would otherwise shield the recording from discovery.[214]

Second, where surreptitious recording is permitted, lawyers must not construe their right to record as a license to be otherwise deceitful in connection with the recording.[215] For example, if a party to a recorded conversation asks the lawyer whether he intends to record or is recording their discussion, the lawyer must answer truthfully.[216] If the party objects to being recorded, the lawyer must either agree that he will not record the conversation or tell the party that he intends to record the conversation despite the objection, allowing the other party to terminate or forego the conversation.[217] A lawyer who secretly records a conversation with the intent to publish the recording or disseminate a transcript cannot lead the recorded party to believe that the conversation

210. *Id.* at 1117–18; *see also* Smith v. WNA Carthage, L.L.C., 200 F.R.D. 576, 578–79 (E.D. Tex. 2001); Northfield Ins. Co. v. George E. Busson Realty Co., No. CIV. A. 99-151, 1999 WL 804076, at *2 (E.D. La. Oct. 7, 1999); Pfeifer v. State Farm Ins. Co., No. CIV. A. 96-1895, 1997 WL 276085, at *3 (E.D. La. May 22, 1997) (involving plaintiff secretly taping co-workers); Otto v. Box U.S.A. Group, Inc., 177 F.R.D. 698, 699–701 (N.D. Ga. 1997) (taping by plaintiff before attorney was retained); Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc., 172 F.R.D. 179, 184 (M.D.N.C. 1997); Ward v. Maritz, 156 F.R.D. 592, 594–98 (D.N.J. 1994); Bogan v. Nw. Mut. Life Ins. Co., 144 F.R.D. 51, 56 (S.D.N.Y. 1992).

211. *Anderson*, 202 F.R.D. at 555 ("Apparently every federal case to address the surreptitious taping issue presented here has relied on ABA Formal Opinion 337 in some way to find the conduct unethical." (citations omitted)).

212. ABA Formal Op. 01-422, *supra* note 20, at 1 (rejecting the "broad proscription" on surreptitious taping stated in Opinion 337).

213. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337, at 94, 96 (1974).

214. *Anderson*, 202 F.R.D. at 558 ("In sum, because we agree that Defendants' counsel engaged in unethical conduct by surreptitiously taping conversations with witnesses, any work-product protection that otherwise may have existed is vitiated and Defendants' tapes must be disclosed to Plaintiff."); *Otto*, 177 F.R.D. at 701; *Sea-Roy Corp.*, 172 F.R.D. at 182–85; *Ward*, 156 F.R.D. at 594 ("The work product doctrine is 'qualified' in another sense: Protection may be vitiated by the unprofessional or unethical behavior of an attorney or a party.").

215. *See, e.g.*, Attorney LS v. Miss. Bar, 649 So. 2d 810, 813 (Miss. 1994) (relying on Rule 4.1 in reprimanding lawyer who surreptitiously recorded conversations with jurors after telling them that he had judge's permission to speak with them when he did not).

216. Miss. Bar v. Attorney ST, 621 So. 2d 229, 233 (Miss. 1993).

217. *See Anderson*, 202 F.R.D. at 556 (implying that people should be given this choice).

is confidential.[218]

Third, lawyers should never surreptitiously record conversations with judges. In a similar though less perilous vein, lawyers should refrain from recording conversations with opposing counsel.[219] If a lawyer believes that her conversations with her opponent are being distorted or mischaracterized, she can always confirm communications in writing or by e-mail, have another person present during important conversations, or simply decline to speak with opposing counsel and instead communicate by letter or e-mail.[220]

Fourth, lawyers who surreptitiously record conversations should be certain to preserve the tapes containing the conversations in addition to having them transcribed. The tapes may be discoverable in litigation, and the failure to preserve them may on the right facts amount to spoliation of evidence. Furthermore, lawyers may need the tapes to prove the accuracy of any challenged transcripts and thus defeat allegations that recordings are incomplete or inaccurate, or that they improperly altered transcripts to obtain an unfair advantage. Lawyers certainly should not alter transcripts or offer any transcribed statements out of context.[221]

In summary, surreptitious recording by lawyers "is an ethical minefield" even in those jurisdictions where it is permitted.[222] Lawyers are wise to consider alternative means of gathering and preserving information before recording conversations without the consent or knowledge of other parties.[223]

IV. CONCLUSION

Private lawyers often engage in surreptitious discovery and covert

218. Okla. Bar Ass'n, Eth. Op. No. 307, at 2 (Mar. 5, 1994), *available at* http://www.okbar.org/ethics/307.htm (last visited June 9, 2005).

219. Nissan Motor Co. v. Nissan Computer Corp., 180 F. Supp. 2d 1089, 1096 (C.D. Cal. 2002) (branding the practice "inconsistent with the courteous and professional administration of the legal system"); Northfield Ins. Co. v. George E. Busson Realty Co., No. CIV. A. 99-151, 1999 WL 804076, at *2 (E.D. La. Oct. 7, 1999) (disapproving of counsel's practice of surreptitiously recording conversations with opposing counsel without notice or consent).

220. *See Nissan*, 180 F. Supp. 2d at 1097 (stating that where "counsel believes that conversations are being mischaracterized, there are traditional and non-invasive ways to address this situation," and offering the first two alternatives listed).

221. *See* People v. Selby, 606 P.2d 45, 47 (Colo. 1997) (disbarring lawyer who secretly recorded conference with judge and who "made an improper use of his recording by misrepresenting the nature of the court's remarks and using a partial quotation taken out of context to support his allegations that the court was biased").

222. Joanne Pitulla, *On the Record*, ABA J., Feb. 1994, at 102, 102.

223. *See id.* (cautioning against secret taping "without compelling justification").

investigations to gather information and evidence for use in litigation. The employment of undercover investigators and surreptitious tape recording by lawyers themselves are two common means of covert discovery, and they can be quite effective.[224] At the same time, many courts and lawyers view these practices through jaundiced eyes, concerned that such tactics are in some way unfair or dishonorable. In criminal cases things are different; courts and lawyers accept that some amount of deception is necessary to combat crime.

Lawyers who engage in covert discovery in civil litigation must do so cautiously.[225] The law varies between jurisdictions, and clear ethics guidelines are not easily formulated. If there is one absolute, it is that lawyers must never lie. If there is a second, it is that undercover investigators should never trick subjects into saying or doing things that they would not otherwise say or do in their normal affairs. Surreptitious recording is a strategy fraught with peril, and a wise lawyer will think carefully about alternative discovery methods before surreptitiously recording conversations without the consent of other parties.

Government lawyers are generally afforded more leeway than their counterparts in private practice. Their greater freedom does not, however, allow them to mislead people about their identities when they are functioning in representational capacities.

In short, the seemingly rigid principles that lawyers are responsible "at all times to be truthful"[226] and that "a license to practice law requires allegiance and fidelity to truth"[227] occasionally bend to allow deceptive lawyering. How far they bend depends on the facts of the case and the jurisdiction. Unfortunately, a case-by-case approach in the context of lawyers' undercover investigations finds no support in applicable ethics rules. Neither Model Rule 8.4(c) nor DR 1-102(A)(4), which prohibit "dishonesty, fraud, deceit or misrepresentation," contain investigative exceptions. And, if nothing else, undercover investigations embody deceit. It is wrong to suggest that they are not deceitful because, for example, salespeople to whom investigators speak in trademark infringement cases routinely wait on customers who never make purchases. If the targets in those cases knew the undercover

224. Attorney M v. Miss. Bar, 621 So. 2d 220, 224 (Miss. 1992) (observing that "[t]he value of secret tape recordings in ferreting out the truth is beyond question").

225. *See* Kathryn A. Thompson, *Legal White Lies*, ABA J., Mar. 2005, at 34, 34–35 (observing that lawyers' use of deceptive or covert investigative techniques poses difficult questions and stating that "lawyers without clear guidance in their jurisdictions might consider leaving their covert tactics for another day when the fog has cleared").

226. *In re* Kalil's Case, 773 A.2d 647, 648 (N.H. 2001).

227. Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186, 1193 (Pa. 1994).

investigators' true identities and purposes, they would never allow them in their showrooms. Even though all business invitees have some economic value to sellers, the same cannot be said for an adversary's undercover investigators.

States should follow Oregon's example and amend their versions of Rule 8.4(c) or DR 1-102(A)(4) to provide an investigative exception. For example, jurisdictions following the Model Rules might enact a rule that provides:

> Notwithstanding Rules 4.1(a), 4.3, 4.4(a), 8.4(a), 8.4(c), and 8.4(d), it shall not be professional misconduct for a lawyer in the course of representing a client to advise the client or others about, or to supervise personally or through others, lawful covert activity in the investigation of illegal or unlawful activities, provided that the lawyer's conduct otherwise complies with these rules. "Covert activity" as used here means efforts to obtain information on illegal or unlawful conduct through deceit, the use of misrepresentations, or other subterfuge. A lawyer may initiate, supervise, or advise on "covert activity" only where the lawyer reasonably believes in good faith that illegal or unlawful activity has taken place, is taking place, or will take place in the foreseeable future.[228]

States could also craft rules specifically applicable to law enforcement personnel who are licensed attorneys and actually investigate undercover, as many FBI agents do.

The creation of new rules to allow for lawful undercover investigations has at least two advantages. First, the rules proposed in this Article provide lawyers with a reasonable means of evaluating their intended conduct where the current law requires an attempt to evaluate potential activities along an imprecise continuum. Second, new rules would relieve courts of the burden of attempting to craft reasonable exceptions to Rule 8.4(c) and DR 1-102(A)(4) based on shifting notions of fairness and anecdotal evidence of what is or is not understood to be acceptable.

No new ethics rules are needed regarding surreptitious recording. That practice is adequately covered by existing rules and by eavesdropping and wiretapping laws. The mere act of surreptitious recording is not inherently deceitful or dishonest, except where judges are the unwitting parties to the recordings.

228. Model Rule 4.3 provides: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." MODEL RULES, *supra* note 12, at R. 4.3. Model Rule 4.4(a) states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." *Id.* R. 4.4(a).