

LEGAL ETHICS FOR INVESTIGATIVE AGENTS?

**U.S. Department of Justice Professional
Responsibility Advisory Office
May 2003**

There are many circumstances in which attorney conduct rules will or may have implications for investigative agents. The rules themselves are written by and for lawyers and are used to regulate the practice of law, although they require that lawyers take steps to ensure that agents and other non-lawyers with whom they are working also abide by the rules. Therefore, investigators should familiarize themselves with the requirements of these rules for two good reasons: 1) to make sure evidence is not excluded; and 2) to protect the reputations of your agencies. This memorandum is intended to give you some familiarity with those rules of professional conduct that most often come into play during investigations and to aid you in avoiding pitfalls in your investigative work.

I. What Are the Rules of Professional Conduct Anyway?

In order to practice law, a lawyer must be a member of a state bar. Each bar has adopted a set of rules that lawyers must follow. The American Bar Association is a voluntary organization of lawyers that drafts model rules, which the various state bar organizations often adopt, in whole or in part. The rules in each jurisdiction are therefore unique, although there are general principles that apply in every jurisdiction. Failure to follow those rules can result in sanctions to the lawyer, including revocation of the lawyer's license to practice law.

II. How Is It That Lawyer's Rules Apply to Investigative Agents?

There are two general rules of professional conduct that can make a lawyer responsible for the conduct of an investigative agent with whom the lawyer is working. One rule (Rule 8.4(a)) states that it is professional misconduct for a lawyer to violate the rules of professional conduct through the acts of another. The second rule (Rule 5.3(c)) states that a lawyer is responsible for the conduct of a non-lawyer, if the lawyer supervised or ordered the conduct or "ratifies" the conduct or could have prevented or mitigated the effects of the conduct. While the government lawyers with whom you work do not directly supervise you, some judges may still hold them accountable for your conduct on account of the rules.¹ Oftentimes, the government lawyer will urge that, if a court finds a rule violation, any sanction be against the lawyer, not the case; but the court has discretion and sometimes does prohibit the lawyer from using evidence obtained by an agent in violation of the rules. In addition, the cases differ about when a lawyer "ratifies" the conduct of an agent or other non-lawyer. This issue comes up at trial when a defendant moves to have evidence excluded on the ground that the use of the evidence obtained by an agent in violation of a rule constitutes a ratification. The courts and legal authorities disagree on the answer to the question, but it is important for you to recognize it as an issue.

¹ Rule 5.3(b) states that a lawyer having direct supervisory power over a nonlawyer has to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

There is also a more specific rule that requires that prosecutors take special precautions to make sure that investigative agents do not make pre-trial, out-of-court statements that would have a substantial likelihood of materially prejudicing a proceeding or that would have a substantial likelihood of heightening public condemnation of the accused (Rule 3.8(f)).

When investigative agents learn about all the different requirements of the attorney conduct rules, they sometimes argue that investigators should conduct their investigations totally independently of the lawyer and in this way avoid the constraints of the attorney conduct rules. As a practical matter, given the necessary involvement of attorneys in issuing grand jury subpoenas, seeking wiretap orders, and in other techniques used in investigating complex federal crimes, it may be impossible for an attorney not to be involved at the investigative stage. Moreover, you should be aware that, no matter how independently the agents may try to operate, courts may still apply the attorney conduct rules, either when a lawyer is consulted on a legal issue, such as constitutional questions implicated in interviewing a suspect, or not, as when the lawyer simply tries to use the evidence.

III. What Exactly Do The Most Important and Relevant Rules Provide?

For each of the following issues, you first should determine which rules of professional conduct apply and then examine the particular rule in question. You can do this by consulting an attorney in the governmental office who will handle the case.

A. Contacts with Represented Persons.

Every jurisdiction has a provision providing generally that a lawyer may not communicate with a person the lawyer knows to be represented about the subject matter of the representation (ABA Model Rule is 4.2). There are exceptions to this rule. The rule in every jurisdiction permits such a communication with the consent of the person's lawyer. The rule in every jurisdiction but two (Florida and Puerto Rico) contains language creating an exception for communications "authorized by law." The rule on its own, or read in conjunction with other rules (such as Rule 8.4(a) and 5.3(c) discussed earlier), would prohibit an agent working on a case with a lawyer from engaging in a communication when the lawyer could not.

This rule raises many questions, and there are numerous cases deciding issues relating to it. The answers to the questions differ, depending on the applicable rule and the case law in the relevant jurisdiction.

* How are you supposed to *know* when an individual is represented by a lawyer?

You have to pay attention to what the individual says on this issue. Also, where the individual has a lawyer on one case, for example, a state investigation of health care fraud, you probably should "know" that the individual is represented in your federal investigation of the same matter, unless there are good reasons not to think so, e.g., when a

lawyer tells you he does not represent the individual in your investigation.

* What if the individual has been represented in the past by a lawyer?

This fact alone would not be enough to know that the individual is or is not represented. However, if the lawyer continues to work for the individual, then that is a fact to be considered.

* If the “individual” is a corporation that employs a general counsel, does the general counsel necessarily represent that corporation *on the matter* you are investigating?

Generally speaking, the fact that a corporation has a general counsel does not mean that the corporation is represented with respect to your investigation of a particular incident or practice.

* Which *persons* in the corporation does the corporation’s attorney represent?

The answer to this question is going to depend on where the case is or will be tried, or where the lawyers are members of the bar. The states vary, and in some jurisdictions, such as D.C., only employees who have the power to bind the corporation with respect to the representation itself are

covered by the rule’s prohibition. In other states, however, even some low-level employees are considered to be represented by the corporation’s attorney.

* Is a *former employee* considered to be represented by corporation’s attorney?

In many jurisdictions, but not all, a former employee is not considered to be represented by the corporation’s attorney. That means that you are free to communicate with former employees about most things but not about “privileged matters.”

* Is it necessary to ask every individual if he or she is represented?

It usually is not necessary to ask every individual; that answer would change if you have reason to believe that someone is represented. In that case, you should inquire.

* If a corporate employee has his own counsel who would permit you to communicate with the individual, do you also have to get the consent of the corporation’s attorney?

In many jurisdictions, but not all, if a corporate employee has separate counsel, then you may properly communicate with the individual if you have

the consent of that person's separate counsel.

* Can the individual consent to the communication or does the lawyer have to consent?

No. Only the lawyer can consent.

* Since the rule only prohibits communications about the subject matter of the representation, are you permitted to talk with the individual about a different but related subject?

That depends on the relationship between the two.

* What is considered a "communication"? (Is a letter a communication? Can you just listen?)

Listening and writing or receiving a letter are communications.

* Does the rule even apply before an individual is charged with a crime or a law suit is filed?

The answer to this question varies, depending on which state's rules apply and on the stage of the investigation.

* When are you "authorized by law" to communicate with a represented person?

This phrase has been interpreted to mean that you may communicate with a represented individual if a

specific law, a court order, or a previous decision of the court in that jurisdiction would permit it.

* If the rule applies to post-indictment communications with represented persons, and the rule applies to agents who are working with lawyers, is it permissible for agents who arrest an indicted defendant to give Miranda warnings and get a statement from him?

This is a difficult question, not susceptible to a short answer and included here so that you think about it. A few states' rules specifically permit post-arrest Mirandized communications with represented individuals; on the other hand, at least one federal case suggests that it is impermissible.

B. You Must Not Use a Method of Obtaining Evidence That Violates the Rights of Another Person.

Most jurisdictions have a rule or a number of rules that, read together, prohibit a lawyer and an agent working with a lawyer from obtaining evidence by violating the "legal rights" of another person (ABA Model Rule 4.4(a)). The "legal rights" of a third person include constitutional and statutory rights and rights recognized by case law, including privileges. For example, this rule has been used to prevent a lawyer from reviewing and copying psychiatric records of a litigant. It would prohibit you from asking questions if the answer would be privileged and the person you are asking does not have the power to waive the

privilege. The most common way in which this rule would come into play is if, in the course of an investigation, you lawfully obtain information that is “privileged.” You may not always be able to determine in advance whether a document was intended to be privileged (and was inadvertently disclosed or was released by unauthorized persons), but there are some indicia that should put you on notice to ask some questions about the document. For example, if a document is on a lawyer’s stationery, is addressed to a client of the lawyer, and contains a notice such as “Confidential Attorney-Client Privileged Document” then you have some idea that there might be a claim that it is privileged. Before you read that document and before you integrate it into the file, it would be smart to find out how the document came into your possession. If the client waived the privilege (as, for example, a corporation may agree to do during an investigation), there is no reason not to read it. However, if the client did not waive the privilege, there are jurisdictions that would require you to return the document and also to refrain from using it. If you have not separated out such a document and it is later found to be privileged, you then would be hard pressed to establish that the information in it did not affect other parts of the investigation. Not every jurisdiction has such a rule, and so it is important to know what the applicable jurisdiction requires.

C. Trial Publicity Rules

Every jurisdiction has a rule (either a rule of professional conduct or a court rule) that provides that a lawyer should not make a statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or should know that the statement

will have a substantial likelihood of prejudicing an adjudicative proceeding (ABA Model Rule 3.6). Here, again, the rule applies to agents working with lawyers. There is another rule applicable to prosecutors (ABA Model Rule 3.8) that specifically requires the prosecutor to make efforts to prevent investigators and other law enforcement personnel from making statements outside the courtroom that the lawyer could not make. This second rule explains that prosecutors and agents properly may make statements that inform the public about the investigation if those statements serve a legitimate law enforcement purpose but should refrain from making statements outside the courtroom that “have a substantial likelihood of heightening public condemnation of the accused.” You should be aware that, in some jurisdictions, the rules do not permit an attorney (or an agent working with the attorney) to identify or display the items seized at the time of arrest or in connection with a search warrant.

Since the publicity rules are designed to assure fair proceedings, it is not surprising that the penalty for a violation of the rules can result in reversal of a conviction.

D. You Must Always Be Honest With the Court.

Every court requires those who appear before it to be honest (ABA Model Rule 3.3). Honesty means more than simply telling the truth. It may require you to make a statement, rather than leave the court with an erroneous impression. It may require you to correct the record in the court, even sometimes after a case has been closed. While you may know that the legal authorities hold sacrosanct the

attorney-client relationship -- that is in part the reason for prohibiting a lawyer from disclosing the confidences of a client -- you may not know that in many jurisdictions a duty of candor to the court trumps even the a duty of confidentiality to a client. This rule is particularly exacting when the government lawyer is the only one presenting evidence to the court, that is, when involved in an *ex parte* proceeding.

You may be surprised to learn that the candor rule applies whenever the government lawyer, through you, supplies information to the court, such as when you prepare an affidavit that is filed with the court. If the affidavit does not tell the whole story, then the case could suffer consequences. Candor issues arise in many different circumstances. Here are some examples:

- where a confidential informant identifies herself while on the stand and under oath with a name supplied by your agency but that is not her real name.
- where an affidavit in support of a wiretap does not contain a complete picture of previous methods tried and failed and alternative options for the government to obtain the information without the wiretap.
- where, after testifying in a deposition, a government witness discovers that the information provided in the deposition was incorrect.

In each of these circumstances, both your cases and your reputation can

suffer from the potential consequences of such non-disclosures.

E. Practice of Law and Negotiation of Agreements

Every jurisdiction has its own definition of what constitutes the practice of law and provides that only those properly authorized may practice in that jurisdiction; some jurisdictions have criminal statutes prohibiting the unauthorized practice of law. We refer to such rules here because investigative agents who give advice to persons about possible violations of various laws, who assist in the preparation or interpretation of legal documents, or who “negotiate” criminal penalties may be engaged in the unauthorized practice of law. Only government lawyers may properly negotiate pleas of guilty, cases of civil settlement, or the granting of immunity. Agents who attempt to negotiate on behalf of the government not only may subject themselves to penalties, but they also may undermine the cases they are attempting to resolve.

Reprinted with special permission of the DOJ Professional Responsibility Advisory Office, Claudia Flynn, Director.