

(DRAFT – March 26, 2009)

LEGAL ETHICS OPINION 1845

USE OF COVERT TACTICS BY  
THE VIRGINIA STATE BAR IN  
UNAUTHORIZED PRACTICE OF  
LAW INVESTIGATIONS

In this hypothetical, “A” is a paralegal who worked for “Lawyer B” for twenty years until “Lawyer B’s” death. Lawyer B, a solo practitioner, limits his practice to trust and estate work. Through the years, under Lawyer B’s supervision, “A” became quite proficient in preparing wills and powers of attorney for clients. In the process of assisting in the closing of the practice, “A” collected and took with her forms that “Lawyer B” had used for preparing wills, advanced medical directives and powers of attorney (“POAs”). “Lawyer B” practiced in a relatively small community and both “Lawyer B” and “A” were known and highly regarded. “A” did not seek new employment after “Lawyer B’s” practice was closed. Instead, over the ensuing years “A,” through word of mouth, offered legal services to people she knew and to others who were referred to her, by providing assistance in preparing wills, POAs, and advanced medical directives—using the forms she had kept from “Lawyer B’s” practice. “A” did not, however, advertise or publicly hold herself out as providing such services.

Recently, a circuit court clerk filed an unauthorized practice of law complaint with the Virginia State Bar’s Standing Committee on Unauthorized Practice of Law (“UPL Committee”) against “A” alleging that “A” has made a business of preparing wills and POAs and these wills are now turning up years later as testators die and as wills are admitted to probate. Certain problems are being discovered in how the documents were drafted and questions asked about the circumstances under which they were prepared. The clerk’s information is based almost exclusively on hearsay and documents the clerk has seen admitted to probate.

Proving the allegations in the complaint is extremely difficult. No one involved, either those presenting the wills or attorneys or court personnel reviewing the wills, has ever had any direct contact with “A” or was present when she drafted the documents, which are now years old. “A” has not responded to the complaint<sup>1</sup> and no one can/will provide any information as to whether “A” is still engaged in this activity or substantiate what, if anything, she has done in the past. Also, no source exists to contradict the circumstantial evidence that “A” indeed engaged in what is alleged. The evidence on the face of the complaint is insufficient for the UPL Committee to make a finding of unauthorized practice or to make a referral to the Office of the Attorney General or a Commonwealth’s Attorney. Moreover, because of the absence of witnesses who can testify or produce substantive evidence,<sup>2</sup> there is no way that the UPL Committee can meet its burden of proof in an enforcement proceeding against “A.”<sup>3</sup>

<sup>1</sup> Engaging in the unauthorized practice of law (“UPL”) is a criminal offense, a Class 1 Misdemeanor. Va. Code §54.1-3904 (Repl. Vol. 2005). Therefore, the defendant in this case, “A,” can refuse to respond to the UPL complaint or a subpoena if doing so would violate her privilege against self-incrimination.

<sup>2</sup> By the time a document is admitted to probate, it is not uncommon for witnesses to its execution to be unavailable.

<sup>3</sup> In a civil proceeding, the Commonwealth must prove that the defendant engaged in UPL by a “preponderance of the evidence.” In criminal proceedings, the burden of proof is “beyond a reasonable doubt.”

41 Furthermore, the UPL Committee has reason to believe that “A” continues to provide  
42 these services to the public to their detriment. To obtain evidence that “A” is providing legal  
43 services to the public, Ethics Counsel and/or Assistant Ethics Counsel who staff the UPL  
44 Committee (“staff counsel”) need to direct a Virginia State Bar (“VSB”) investigator or some  
45 other willing outside volunteer to contact “A” under the pretext of wanting a will and/or POA  
46 prepared, collect and pay for these services, and report back the results. In effect, staff counsel  
47 and the investigator propose to employ an “undercover”/ “sting” operation to catch “A” engaging  
48 in unlawful or criminal activity.

49

## 50 QUESTIONS REGARDING ETHICAL CONDUCT

51

52 1. Is it ethical for staff to direct a bar investigator or other outside investigator/volunteer  
53 to engage in covert investigative techniques in the investigation of the unauthorized  
54 practice of law described in this hypothetical?

55

56 2. Is it ethical for the staff counsel to direct a bar investigator or other outside  
57 investigator/volunteer to engage in covert investigative techniques in the investigation of  
58 the unauthorized practice of law in *any* case in which similar circumstances of lack of  
59 witness cooperation, lack of substantive evidence and significant harm to “clients” exist  
60 and no other reasonable alternative is available for obtaining information against the  
61 person engaging in unauthorized practice?

62

## 63 APPLICABLE RULES &amp; OPINIONS

64

65 The appropriate and controlling rules relative to this hypothetical are Rules 5.3(c)(1),  
66 which outlines a lawyer’s responsibilities regarding non-lawyer assistants, Rule 8.4 (a), which  
67 prohibits a lawyer from violating or attempting to violate a rule of conduct through the actions of  
68 another, and Rule 8.4(c), which deals with lawyer misconduct that reflects adversely on the  
69 lawyer’s fitness to practice law. Also pertinent to the Committee’s analysis are LEO 1738  
70 (attorney participation in electronic recording without consent of party being recorded), and  
71 Supreme Court LEO 1765 (government attorney performing undercover work without violating  
72 8.4).

73

## 74 ANALYSIS OF THE QUESTIONS PRESENTED

75

76 This opinion addresses the ethical propriety of staff counsel to the UPL Committee  
77 supervising an undercover investigation to determine whether someone is engaging in the  
78 unauthorized practice of law. The lawyers are not conducting the covert investigation but have  
79 directed a lay staff investigator, regularly employed by the VSB, to perform the covert  
80 investigation. The tactics or techniques used by the investigator would involve some form of  
81 deception, i.e., misrepresentation of identity or purpose, in order to catch the suspect engaging in  
82 conduct that is unlawful or criminal.

83

84 In answering the first question, this Committee believes, based upon the facts presented  
85 in the hypothetical, that the use of an undercover or “sting” operation by a lay investigator, under

86 the direction of Ethics Counsel and Assistant Ethics Counsel, does not violate the Rules of  
87 Professional Conduct.

88  
89 Rule 8.4 (c) of the Rules of Professional Conduct states in pertinent part that “it is  
90 professional misconduct for a lawyer . . . to engage in conduct involving dishonesty, fraud, deceit  
91 or misrepresentation *which reflects adversely on the lawyer’s fitness to practice law. . . .*”  
92 (emphasis added).<sup>4</sup> Rule 8.4 (a) prohibits a lawyer from violating or attempting to violate a rule  
93 of conduct through the actions of another, i.e., a lay investigator.

94  
95 Rule 5.3 (c)(1) also applies to the Committee’s analysis, holding that a lawyer is  
96 ethically responsible for a non-lawyer’s conduct that violates the Rules of Professional Conduct  
97 if the lawyer orders or, with the knowledge of the specific conduct, ratifies it. Comment [1] to  
98 Rule 5.3 notes: “[a]t the same time, however, the Rule is not intended to preclude traditionally  
99 permissible activity such as misrepresentation by a non-lawyer of one’s role in a law  
100 enforcement investigation or a housing discrimination “test.”

101  
102 The Committee observes that one who engages in the unauthorized practice of law is  
103 committing a criminal act.<sup>5</sup> Through the State Bar Act of 1938, the General Assembly created  
104 the VSB as the administrative agency charged with investigating and reporting violations of rules  
105 and regulations adopted by the Supreme Court of Virginia.<sup>6</sup> The Unauthorized Practice Rules  
106 (“UPRs”) are adopted by the Supreme Court of Virginia and published in Part 6, Section I of the  
107 Rules of Court. Staff counsel are required by the Rules of Court to investigate written  
108 complaints of the unauthorized practice of law and report to the Committee the status of the  
109 investigation within 180 days from when the complaint is filed. Upon review of all the evidence  
110 presented, the UPL Committee then determines the appropriate disposition of each complaint.<sup>7</sup>

111  
112 In short, staff counsel are charged by law with the duty to investigate conduct that is  
113 unlawful or criminal and the UPL Committee reviews and evaluates the evidence gathered in that  
114 investigation and makes a determination as to what further action to take or not against the  
115 respondent. Since, in this hypothetical, “A” has made it known by word of mouth that she is  
116 available to prepare legal instruments and is accepting legal work by referral, the only viable  
117 means to discover “A’s” criminal or illegal activity is to have an investigator pose as a  
118 prospective client interested in obtaining a legal instrument.

119  
120 It is generally known and very well accepted that law enforcement authorities, including  
121 government lawyers, are authorized to conduct or supervise undercover operations using  
122 deception to gather information about criminal conduct.<sup>8</sup> This Committee has opined that

---

<sup>4</sup> The Committee notes that the italicized language was added to the rule by an amendment effective March 25, 2003.

<sup>5</sup> See note 1, *supra*.

<sup>6</sup> Va. Code §54.1-3910 (Repl. Vol. 2005).

<sup>7</sup> *Id.* at para. 10 (h)(ii). Possible dispositions include: dismissal, dismissal with caution, dismissal with letter agreement to cease and desist, referral to the Office of the Attorney General for a writ *quo warranto*, or referral to a Commonwealth’s Attorney for criminal prosecution under the misdemeanor statute.

<sup>8</sup> As this Committee observed in Legal Ethics Op. 1738:

123 lawyers involved in undercover activity or who supervise such activity are not acting unethically  
124 despite the prohibition against conduct involving fraud, dishonesty, deceit or misrepresentation  
125 reflecting adversely on the lawyer's fitness to practice law.<sup>9</sup>  
126

127 The Committee has also stated that although undercover investigations involve some  
128 elements of misrepresentation and deceit, the conduct does not reflect adversely on the fitness or  
129 character of the lawyer directing or supervising a lawful criminal investigation.<sup>10</sup> The Supreme  
130 Court of Virginia has specifically approved a legal ethics opinion that recognizes a "law  
131 enforcement" exception to Rule 8.4 (c).<sup>11</sup> This "law enforcement exception" includes civil  
132 investigations using "testors" conducted under the supervision of government lawyers charged  
133 with investigation and prosecuting cases of housing discrimination.<sup>12</sup> This Committee sees no  
134 principled distinction to be drawn between these types of investigations, in which undercover  
135 operations have been approved, and the UPL investigation presented in this hypothetical in  
136 which lawyers and agents of a governmental agency are charged by law with the investigation of  
137 conduct that is criminal or illegal.  
138

139 Therefore, in answer to the second question, it is the Committee's opinion that it is  
140 ethical for staff counsel of the VSB to direct a bar investigator or other outside  
141 investigator/volunteer to engage in covert investigative techniques in the investigation of the  
142 unauthorized practice of law in *any* case in which no other reasonable alternative is available to  
143 obtain information against the person engaging in the unauthorized practice of law.  
144

145 This opinion is advisory only and not binding on any court or tribunal.

---

[T]he courts have recognized that deception in the search for truth is justified in some circumstances in both the law enforcement and private realms. *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (artifice and stratagem are "frequently essential to the enforcement of the law" in order to "reveal criminal design; to expose illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators to the law"); *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring) (stating that contraband offenses "are so difficult to detect in the absence of undercover Government involvement"); *United States v. Russell*, 411 U.S. 423, 432 (1973) (asserting that infiltration of drug rings, the only practicable means of detecting unlawful conduct, is a recognized and permissible means of investigation); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("it would be difficult indeed to prove discrimination in housing without [the tester's] means of gathering evidence").

<sup>9</sup> Virginia Legal Ethics Ops. 1738, 1765; Rule 8.4 (c), *supra*.

<sup>10</sup> *Id.*

<sup>11</sup> See Virginia Legal Ethics Op. 1765 (app'd by the Supreme Court of Virginia on February 6, 2004).

<sup>12</sup> Virginia Legal Ethics Op. 1738; cmt [1], Rule 5.3.