

1985

The Greylord Investigation Guidelines: Protection for Greylord Attorneys?

Andrew Majeske

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Andrew Majeske, *The Greylord Investigation Guidelines: Protection for Greylord Attorneys?*, 16 Loy. U. Chi. L. J. 641 (1985).

Available at: <http://lawcommons.luc.edu/lucj/vol16/iss3/15>

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The Greylord Investigation Guidelines: Protection for Greylord Attorneys?

INTRODUCTION

During the embryonic stages of Operation Greylord¹ those planning the investigation decided that its success would require the use of undercover techniques in the courtroom.² While these planners were concerned with possible violations of the Model Code of Professional Responsibility ("Model Code"),³ they reasoned that their actions could be justified under existing ethical regulations.⁴ This reasoning soon was complicated, however, by *In re Friedman*,⁵ an Illinois Supreme Court case decided during the planning

1. Operation Greylord was a three and one-half year undercover investigation of corruption in the Cook County court system conducted by the Federal Bureau of Investigation, United States Attorney for the Northern District of Illinois, and the Cook County State's Attorney. The investigation included, among other things, the creation of more than seventy "fake" criminal cases, the wiretapping of one state judge's chambers, and the undercover help of one judge who was wired for sound. To date, twenty-one Greylord defendants have been convicted of charges stemming from the investigation, including four judges. Charges are pending against five others. *LeFevour* Conviction a Boost for Prosecutors, Chicago Daily Bulletin, July 15, 1985, at 1, col.2. See also *Greylord's Uneasy Fallout*, A.B.A. J., Mar. 1984 at 35; *The Judge Who Wore a Wire*, A.B.A. J., Feb. 1984 at 76; *The Big Fix Inside Greylord*, Chicago Tribune, Mar. 3, 1985, at 1, col. 3; *Greylord Figure Pleads Guilty*, Chicago Sun-Times, Jan. 26, 1985, at 3, col. 1.

2. See *infra* notes 86-89 and accompanying text.

3. See *infra* notes 37-44 and accompanying text. On August 2, 1983, the American Bar Association ("ABA") adopted the Model Rules of Professional Conduct ("Model Rules") in place of the Model Code of Professional Responsibility ("Model Code") which had been adopted in 1969. Few states, however, have adopted the Model Rules. See T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 28 (3d ed. 1984). Since the Illinois Code of Professional Responsibility ("Illinois Code") is still based upon the Model Code, see *infra* note 40, and because Illinois is the jurisdiction focused upon in this note, the Model Rules will not be addressed here. It should be sufficient to say that like the Model Code, the Model Rules do not have a good-motive exception. See generally *infra* note 43. Three of the four Model Code sections dealt with in this note, see *infra* note 42 and accompanying text, have corresponding sections in the Model Rules. They are:

<u>Model Code</u>	<u>Model Rules</u>
DR 1-102(A)(4)	Rules 3.3(a)(1), (2), & (4),
	3.4(a), (b), 8.4(c) & (B)
DR 7-102(A)(4)	Rules 3.3(a), (c), 4.1
DR 7-102(A)(6)	Rules 1.2(d), 3.4(b)

MODEL RULES OF PROFESSIONAL CONDUCT ("MODEL RULES"), Table B (1983).

4. See *infra* notes 86-89 and accompanying text.

5. 76 Ill. 2d 392, 392 N.E.2d 1333 (1979).

stages of Operation Greylord. *Friedman* addressed the issue of whether the use of undercover techniques in the courtroom could be justified, or whether this use violated the Model Code regardless of motivation.⁶

As a result of *Friedman*, the United States Attorney for the Northern District of Illinois at the time,⁷ developed six guidelines to be used in the Greylord investigation.⁸ The guidelines were meant to address the difficulties of using undercover techniques in the courtroom without violating the Model Code.⁹ The guidelines were also meant to prevent Model Code violations when Greylord attorneys used undercover techniques in court.¹⁰

This note briefly will sketch the use of undercover techniques by government law enforcement officers and the reaction of the courts to these methods. Then, it will discuss possible Model Code violations resulting from the use of these techniques in the courtroom. Next, the note will analyze the Greylord investigation guidelines in light of *Friedman* and demonstrate that the guidelines fail to prevent violations of the Model Code. Finally, this note will explain how undercover techniques could be used in court without violating the Model Code and how a form of the Greylord Guidelines could be useful in attaining this end.

BACKGROUND

Evidence-gathering techniques, such as ruses¹¹ which include the involvement of government agents in criminal activities, are acceptable law enforcement techniques today.¹² This is because in

6. See *infra* notes 67-85 and accompanying text.

7. The United States Attorney from 1977-1981 was Mr. Thomas Sullivan.

8. See *infra* note 88 and accompanying text.

9. See *infra* note 89 and accompanying text.

10. *Id.*

11. Mr. Sullivan used the word "ruse" to describe undercover investigative techniques, in his lecture at Loyola University of Chicago School of Law on March 15, 1984; see 16 LOY. U. CHI. L.J. 99, 100 (1985) [hereinafter cited as Sullivan Lecture].

12. Undercover investigations were recognized as a legitimate evidence-gathering technique by the Supreme Court over fifty years ago in *Olmstead v. United States*, 277 U.S. 438 (1928). The Court in *Olmstead*, in holding that such techniques were valid, relied upon the long history of criminal cases "where officers of the law have disguised themselves . . . and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received." *Id.* at 468; see also *Sorrells v. United States*, 287 U.S. 435, 441 (1983) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises.").

These techniques are acceptable at least insofar as the courts are now unable, and the legislature has not chosen, to control and regulate such activities. See *United States v.*

many instances, law enforcement officers lack the requisite intent to be convicted for criminal conduct.¹³ Accordingly, many states have enacted "justification" statutes that allow this type of conduct.¹⁴

Governmental involvement in crime for law enforcement purposes, however, has not always been accepted to the extent that it is today. In the late 1920's and early 1930's, the United States Supreme Court debated whether to allow this involvement by the government without an accompanying penalty.¹⁵ The Court considered denying the government the use of the courts in such a situation, reasoning by analogy that the government was attempt-

Lau Tung Lam, 714 F.2d 209 (2d Cir.), *cert. denied*, 104 S. Ct. 359 (1983). See *infra* note 35 regarding recent legislative scrutiny of such activities.

13. A case in which this issue was raised but not relied upon by the court is *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982) wherein the facts show a fine example of the trickster tricked.

14. For example, the New York "justification" statute states:

[C]onduct which would otherwise constitute an offense is justifiable and not criminal when . . . [s]uch conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions.

N.Y. PENAL LAW § 35.05 (McKinney 1975). The *Practice Commentaries to N.Y. PENAL LAW* § 35.05 explain that this statute "was designed to exempt peace officers and other public servants from criminal liability for conduct reasonably performed by them in the course of their duties . . . such as possession of narcotics, policy slips, and tear gas. . . ." Hechtman, *Practice Commentaries to N.Y. PENAL LAW* § 35.05 (McKinney 1975). At least 18 states in addition to New York have similar statutes. See ARK. STAT. ANN. § 41-503 (1975); COLO. REV. STAT. § 18-1-701 (1973); CONN. GEN. STAT. § 53a-17 (1977); DEL. CODE ANN. tit. 11 § 704.11 (1979); GA. CODE § 26-901(b) (1978); HAWAII REV. STAT. § 703-307 (1976); IOWA CODE § 411 (West 1979); KY. REV. STAT. § 503.040 (1975); LA. REV. STAT. ANN. § 14.18(1) (West 1974); ME. REV. STAT. ANN. tit. 17a § 102 (1976); N.H. REV. STAT. ANN. § 627.5 (1974); N.D. CENT. CODE § 12.1-05-02 (1976); OHIO REV. CODE ANN. § 2901.05(c)(2) (Page Supp. 1973); OR. REV. STAT. § 161.195 (1979); 18 PA. CONS. STAT. ANN. § 504 (Purdon 1973); TEX. PENAL CODE ANN. § 9.21 (Vernon 1974); UTAH CODE ANN. § 76-2-401(2) (1978); WIS. STAT. § 939.45 (1979).

See also Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 575 n.57 (1982).

Illinois does not have a "justification" statute, although it does have a "necessity" statute which provides:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.

ILL. REV. STAT. ch. 38, ¶ 7-13 (1977).

See generally Note, *Refusal to Discipline Deceitful Illinois Prosecutor*—In re Friedman, 29 DE PAUL L. REV. 657 (1980).

15. Two cases in which the Supreme Court encountered government use of undercover techniques prior to the adoption of the entrapment defense were *Olmstead v. United States*, 277 U.S. 438 (1928), and *Casey v. United States*, 276 U.S. 413 (1928).

ing to use the equity courts with unclean hands.¹⁶ This reasoning, however, was rejected as the Court began to acknowledge the need for law enforcement methods that required governmental agents to be involved in criminal activity.¹⁷ As a result, the Supreme Court began to follow the path taken by the lower federal courts by allowing governmental involvement in crime but recognizing the defense of entrapment.¹⁸ In this way, the Supreme Court allowed the government to implement more effective law enforcement techniques, yet it reserved the right to limit or control these methods.¹⁹

The entrapment defense, as originally formulated, focused upon both the conduct of the government and the conduct of the accused.²⁰ The defense was successful if the accused could establish that he was not predisposed to commit the crime and show that the government agents were primarily responsible for the crime due to their own involvement in the criminal activities.²¹ If these two ele-

16. According to Justice Brandeis, not only would the "unclean hands" argument be a valid defense for the defendant, the issue could and would be made *sua sponte*. *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting).

17. See *infra* notes 20-25 and accompanying text.

18. The defense of entrapment was unknown at common law and was not recognized as a substantive defense by the United States Supreme Court until 1932 in *Sorrells v. United States*, 287 U.S. 455 (1932). See DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 244 (1967); see also Mikell, *The Doctrine of Entrapment in the Federal Court*, 90 U. PA. L. REV. 245, 246 (1942).

Entrapment was recognized as a defense in the lower federal courts as early as 1915 in *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915). The defense was discussed even earlier in *United States v. Whittier*, 28 F. Cas. 591 (E.D. Mo. 1878); see also Gershman, *supra* note 14, at 567, 582 n.85.

19. Undercover techniques were originally used "to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses . . ." *Sorrells v. United States*, 287 U.S. 435, 442 (1932). These techniques are most often used to combat "contraband offenses . . . which are so difficult to detect in the absence of undercover government involvement." *Hampton v. United States*, 425 U.S. 484, 495 n.7, (1976) (Powell, J., concurring); see also *United States v. Russell*, 411 U.S. 423, 432 (1972); *United States v. Archer*, 486 F.2d 670, 676 (2d Cir. 1973).

That the defense is meant to limit or control the use of undercover investigative techniques is evident in *Sorrells*: "The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells*, 287 U.S. at 452.

20. The *Sorrells* Court, with regard to the defense of entrapment, noted: "The predisposition and criminal design of the defendant are relevant. But the . . . controlling question [of the entrapment defense is] whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells*, 287 U.S. at 451. Compare the *Sorrells* Court's view of the entrapment defense with Justice Rehnquist's interpretation of *Sorrells* in *United States v. Russell*, 411 U.S. 423, 428-29 (1972), *infra* note 23.

21. *Sorrells*, 287 U.S. at 451.

ments were shown, the accused would not be convicted of the crime.²²

Today, however, the extent of the government's involvement in criminal activities is no longer relevant to the entrapment defense.²³ In order for the entrapment defense to be successful today, the accused must establish that he was not predisposed to commit the crime; he cannot bring the government's own conduct into issue in his defense.²⁴ Consequently, the courts can no longer employ the entrapment defense as a means of controlling or limiting the methods by which governmental law enforcement agents obtain evidence.²⁵

Whether the court can penalize the government for its outrageous conduct in connection with its investigation of illegal activity, by barring prosecution or by other means, is presently a controversial topic.²⁶ The controversy centers around the claim

22. *Id.* at 452.

23. Justice Rehnquist, writing for the Court in *Russell*, held that the sole focus of the entrapment defense is the predisposition of the accused to commit the crime. *United States v. Russell*, 411 U.S. 423, 436 (1972). To support this holding, Justice Rehnquist stated: "This Court's opinion in *Sorrells v. United States* . . . and *Sherman v. United States* . . . held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime." *Id.* at 433. In *Hampton v. United States*, 425 U.S. 484 (1975), Justice Rehnquist indicated that the Court, in *Russell*, had "ruled out the possibility that the defense of entrapment could ever be based upon government misconduct in a case . . . where the predisposition of the defendant to commit the crime was established." *Id.* at 488-89.

For a good overview of the development of the entrapment defense see Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163 (1976); see also Murchison, *The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine*, 47 MISS. L. J. 211 (1976). See generally Defeo, *supra* note 18; Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. PA. L. REV. 245 (1942); Sagarin & MacNamara, *The Problem of Entrapment*, 16 CRIME & DELINQ. 363 (1970); Schechter, *Police Procedure and the Accusatorial Principle*, 3 CRIM. L. BULL. 521 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORDHAM L. REV. 399 (1959).

24. See *supra* note 23.

25. See *supra* note 23.

26. In *Russell*, Justice Rehnquist stated that the Court might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431 (1972). Lower courts have used this language to release defendants based upon the conduct of government law enforcement agents. See, e.g., *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) (where the government set up the drug laboratory and supplied the necessary chemical ingredients, prosecution of the defendants who played only a minor role as financial backers was barred as a matter of due process of law); *People v. Isaacson*, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (coercion upon heavy drug user which consisted of physical force and threat of prosecution in order to obtain his cooperation in undercover activities held to be outrageous). The due process defense may have been narrowed considerably since *Russell*. In *Hampton v. United States*, 425 U.S. 484 (1976), Justice Rehnquist re-

that, regardless of the defendant's predisposition, the conduct of the governmental law enforcement agents violated the defendant's due process rights.²⁷ Although a few courts have found the government's conduct to be outrageous in certain situations, the due process claim rarely succeeds. Even when it does, the various courts' definitions of "outrageous" differ considerably.²⁸

With the absence of any significant controls on the government's conduct, the use of undercover techniques has expanded to include many types of secret crimes,²⁹ especially to the so-called victimless white collar crimes and crimes of corruption in all three branches of government.³⁰ Along with the increased use of undercover tech-

versed his stated position in *Russell* declaring that due process is only a factor if the government conduct violated a protected right of the defendant. The defendant could not seek release based solely on the conduct of the government, no matter how outrageous or shocking. *Id.* at 490. Although Justice Rehnquist wrote the lead opinion, it is not clear whether a majority of the Court agreed with him on this point. See *Hampton*, 425 U.S. at 493 n.4 (Powell, J., concurring).

The narrowness of the due process aspect of the entrapment defense and of the entrapment defense generally is evidenced by the four major opinions which have resulted from the Abscam investigation. See *United States v. Kelly*, 707 F.2d 1460 (D.C. Cir.) *cert. denied*, 104 S. Ct. 264 (1983) (government conduct in Abscam investigation did not reach the level of outrageousness which would bar prosecution of defendant congressman on various bribery charges despite the investigation's reliance upon a convicted swindler to identify and attract targets to whom legitimate as well as illegitimate inducement were offered); *United States v. Williams*, 705 F.2d 603 (2d Cir.) *cert. denied*, 104 S. Ct. 524 (1983) (United States Senator's conviction on bribery charges upheld after court determined that government conduct in the investigation was not so outrageous as to violate due process); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2438 (1983) (government involvement in Abscam was not so excessive as to violate due process and thus bar the conviction of Congressman Myers); *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982) (en banc), *cert. denied*, 457 U.S. 1106 (1982) (since the amounts of the bribes were not so great as to negate the evidence of predisposition as a matter of law, the bribes could not be so overreaching as to violate the due process clause and bar the prosecution of the defendants).

The effect of Abscam upon the entrapment defense has been well documented. See Gershman, *Abscam, The Judiciary and the Ethics of Entrapment*, 91 YALE L.J. 1565 (1982); Note, *Constitutional Law—Entrapment and Due Process of Law—the Efficiency of Abscam Type Operations*, 5 CAM. L. REV. 377 (1983); Note, *Entrapment as a Due Process Defense: Developments After Hampton v. United States*, 57 IND. L.J. 89 (1982).

27. Justice Rehnquist defined "outrageous" in *Russell* (see *supra* note 26) as conduct which ". . . violat[es] that fundamental fairness, shocking to the universal sense of justice." *Russell*, 411 U.S. at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). Lower courts have differed as to what conduct they consider to be fundamentally unfair or shocking to a universal sense of justice. See *supra* note 26.

28. See *supra* notes 26-27.

29. See *supra* note 19. The four Supreme Court cases which have dealt with the entrapment defense all have involved contraband offenses. *Hampton v. United States*, 425 U.S. 484 (1976) (narcotics); *United States v. Russell*, 411 U.S. 423 (1973) (narcotics); *Sherman v. United States*, 356 U.S. 369 (1958) (narcotics); *Sorrells v. United States*, 287 U.S. 435 (1932) (alcohol).

30. *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982) (executive branch: under-

niques, however, has come the potential for abuse.³¹ Specifically, there is the danger that government overreaching will either injure innocent citizens or create crime where there otherwise was none.³² These concerns have recently become the subject of judicial scrutiny,³³ scholarly comment,³⁴ and legislative action.³⁵

cover bribery attempt of allegedly corrupt Georgia state prosecutor); *United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982) (legislature: Philadelphia city council member convicted of accepting bribe from undercover FBI agents in Abscam investigation); *Nigrone v. Murtagh*, 46 A.D.2d 343, 362 N.Y.S.2d 513 (1974), *aff'd*, 36 N.Y.2d 421, 330 N.E.2d 45, 369 N.Y.S.2d 75 (1975) (judiciary: United States Customs Court judge allegedly perjured himself in undercover investigation of corruption in New York criminal justice system).

31. See *infra* notes 33-35. For an in-depth examination and analysis of the problems which can arise from the uncontrolled use of undercover techniques see *ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* (G. Caplan ed. 1983) [hereinafter cited as *ABSCAM ETHICS*].

32. *Id.*; see also *infra* notes 33-35.

33. In the judiciary, the famous words of Justice Brandeis are still the mainstay of those opposing the use of undercover techniques by law enforcement officials:

The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.

Olmstead v. United States, 277 U.S. 438, 484-85 (1928) (Brandeis, J., dissenting).

Two cases which have quoted Justice Brandeis are *United States v. Archer*, 486 F.2d 670, 674-75 (2d Cir. 1973) and *In re Friedman*, 76 Ill. 2d 392, 397-98, 392 N.E.2d 1333, 1335-36 (1979). In *Archer*, Judge Friendly added some strong language of his own:

[T]here is certainly a limit to allowing governmental involvement in crime. . . . Governmental investigation involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government induced criminality.

Archer, 486 F.2d at 676-77 (footnote omitted).

34. The absence of any controls to check the uninhibited use of undercover investigative techniques worries even the staunchest supporters of these techniques. "This result [of allowing due process controls] is necessary to guard adequately against government overreaching." Gersham, *supra* note 14, at 605; see also *ABSCAM ETHICS*, *supra* note 31.

35. The United States Senate recently formed a special committee to examine these undercover techniques. The committee's findings identify many problems with these techniques and propose some solutions. This excerpt is taken from the committee's summary:

The Select Committee also finds that use of the undercover techniques creates serious risks to citizens' property, privacy, and civil liberties, and may compromise law enforcement itself. Even when used by law enforcement officials with the most honorable motives and the greatest integrity, the undercover techniques may on occasion create crime where none would otherwise have existed. It may lead a government agent to offer an illegal inducement to a person who

Of particular significance is the expanded use of these techniques in the courtroom.³⁶ This practice potentially violates provisions of the American Bar Association Model Code of Professional Responsibility ("Model Code").³⁷ The Model Code is a compilation of the norms of conduct and ethical rules which govern the conduct of the legal profession.³⁸ The Model Code consists of Ethical Consideration ("EC's"), which are aspirational goals toward which all lawyers should strive, and Disciplinary Rules ("DR's"), which set the levels of conduct beneath which a lawyer cannot fall without being subject to disciplinary action.³⁹ Illinois courts, prior to the legislative adoption of Illinois' Code of Professional Responsi-

has never previously committed a crime and who is not predisposed to do so; cause innocent persons to suffer harm to their reputations or to their property; undermine legitimate expectations of privacy; subject law enforcement agents to unaccustomed temptations, dangers, and stresses; undermine the cohesiveness, effectiveness and value of civic and political organizations; and create an atmosphere of distrust, in which public officials and private citizens must act with some concern for the possibility that colleagues and acquaintances are not who they seem to be, but are agents or informers of the federal, state, or local government. These dangers assume even more importance in undercover operations managed or conducted by agents or officials whose zeal, ambition, or baser motives distort their judgment about the proper role of law enforcement in a democratic society.

Accordingly, the Select Committee finds that the central task of those who recognize both the efficacy and the danger of the undercover technique is to create a system of statutes, guidelines, and rules that, avoiding both the tyranny of unchecked crime and the tyranny of unchecked government intrusion, provide the public with the optimal balance between effective law enforcement and the preservation and nurturing of civil liberties.

Final Report of the Select Committee to Study Undercover Activities of the Department of Justice, S. REP. NO. 682, 97th Cong., 2d Sess. 11 (1982) [hereinafter cited as *Select Committee on Undercover Activities*]; see also *FBI Undercover Guidelines: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 97th Cong., 1st Sess. (1981).

36. The unique nature of the courtroom in this situation was commented upon in *In re Friedman*, 76 Ill. 2d 392, 395, 392 N.E.2d 1333, 1334 (1979). Neither the parties nor the court were able to uncover any analogous cases which had previously been considered by either a court or disciplinary committee.

Commentators have also noted the unique situation presented in *Friedman Greyford's Uneasy Fallout*, *supra* note 1, at 37; *Judge Who Wore a Wire*, *supra* note 1, at 78. In his lecture, Thomas Sullivan also commented upon the special problems which arise when undercover techniques are used in the courtroom:

When the investigation involves the court system, as this one did, unique problems are involved because the Illinois Code of Professional Responsibility prohibits misleading the court by submitting perjured testimony or false evidence.

Sullivan Lecture, *supra* note 11, at 437.

37. See *infra* note 42 and accompanying text.

38. MODEL CODE preamble and preliminary statement (1981).

39. *Id.*

bility in 1980, ("Illinois Code"), based much of its disciplinary action on the Model Code.⁴⁰

The sections of the Illinois and Model Codes potentially violated by the employment of undercover techniques in the courtroom are identical.⁴¹ These sections are: DR 1-102(A)(4) (conduct which involves dishonesty or deceit); DR 7-102(A)(4) (use of perjured testimony); DR 7-102(A)(6) (creation of false evidence); and DR 7-109(B) (the secreting of witnesses).⁴² Neither the Model Code nor the Illinois Code contains a good-motive exception for technical violations of these sections.⁴³ Consequently, while these potential Code violations do not prevent the criminal conviction of the targets of the undercover investigation they do provide a basis for disciplining the attorney regardless of his good motive.⁴⁴ Whether

40. ILL. REV. STAT. ch. 110A, art. VIII (1983) (Committee Commentary, Preface).

Before 1980, the Illinois Supreme Court had not formally adopted the Model Code but often used it as a guide for standards of professional conduct.. *Friedman*, 76 Ill. 2d at 396, 392 N.E.2d at 1335.

In June 1980, the Illinois Supreme Court officially adopted the Illinois Code, effective July 1, 1980. The Illinois Code consists only of the DR's of the Model Code. The differences between the DR's in the Illinois Code and the DR's in the Model Code are minimal, and with regard to the DR's mentioned in this note, they are exactly the same. ILL. REV. STAT. ch. 110A, art. VIII (1983) (Committee Commentary, Preface).

41. See *supra* note 40.

42. The full text of these rules provides: DR 1-102(A)(4) ("A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); DR 7-102(A)(4) ("In his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence"); DR 7-102(A)(6) ("In his representation of a client, a lawyer shall not participate in the creation or preservation of evidence when he knows or when it is obvious that the evidence is false"); DR 7-109(B) ("A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein"). ILL. REV. STAT. ch. 110A, art. VIII (1983).

43. The Model Code does not recognize good motive or intent as a defense to violations of its Disciplinary Rules. *Friedman*, 76 Ill. 2d at 412, 392 N.E.2d at 1342 (Moran, J., dissenting); see also *Greylord's Uneasy Fallout*, *supra* note 1, at 36.

44. See, e.g., *People v. Powell*, 72 Ill. 2d 50, 377 N.E.2d 803 (1978); *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1978); see also *In re Friedman*, 76 Ill. 2d 392, 392 N.E.2d 1332 (1979).

Operation Greylord did not involve the federal courts, although the resulting prosecutions have been taking place in the federal courts. See *Greylord's Uneasy Fallout*, *supra* note 1; *Judge Who Wore a Wire*, *supra* note 1. If Operation Greylord had included the use of undercover techniques in a federal district courtroom the same Model Code provisions would have been at issue. See N.D. ILL. R. 3.54(b)(1984):

Plenary Proceedings. Any attorney authorized to practice before this Court who has committed any act or acts of professional misconduct such as fraud, deceit, malpractice, or failure to abide by the provisions of the Code of Professional Responsibility of the American Bar Association may be disbarred from further practice before this Court.

Apparently, this rule does not distinguish between misconduct which occurs in state courts and that which occurs in federal courts. Consequently, a lawyer who went unpun-

disciplinary action should be taken against an attorney who used undercover investigative techniques in the courtroom was first addressed in Illinois in the case of *In re Friedman*.⁴⁵

DISCUSSION

In re Friedman

In 1973, in separate situations, attorneys offered bribes to two police officers. The officers consulted Morton E. Friedman, an assistant Cook County State's Attorney.⁴⁶ On both occasions, Friedman counseled the officers to accept the bribes. Friedman's goal was to obtain evidence for bribery prosecutions against both attorneys. Friedman knew that his actions would involve deception of the court.⁴⁷

The first *Friedman* situation involved a defendant who was arrested and charged with driving under the influence of alcohol.⁴⁸ The defendant's attorney asked the arresting officer to arrange for the absence of the breathalyzer expert from court on the day of the trial.⁴⁹ Although the breathalyzer expert was at the courthouse during the trial and ready to testify, the officer falsely testified that the expert was not present.⁵⁰ As a result, the charges against the defendant were dropped.⁵¹ Friedman informed the court of the deception immediately after it occurred.⁵² Meanwhile, outside of the courtroom, the defendant's attorney paid the officer the bribe and this attorney was later indicted for bribery.⁵³

In the second case, the defendant's attorney asked the officer both to arrest a third-party complainant who filed battery charges against the defendant and to threaten her with prosecution unless

ished for misconduct in a state court might still be disbarred from practicing before the federal court of the Northern District of Illinois.

45. 76 Ill. 2d 392, 392 N.E.2d 1333 (1979). It has been noted that the *Friedman* case is as confusing as it is unique. See *Greyford's Uneasy Fallout*, *supra* note 1, at 35; *Judge Who Wore a Wire*, *supra* note 1, at 76.

46. *Friedman*, 76 Ill. 2d at 393-94, 392 N.E.2d at 1333-34.

47. *Id.*

48. *Id.* A Cook County Circuit Court acquitted the defendant's attorney of criminal bribery charges. He was, however, eventually disbarred as the result of disciplinary charges filed against him by the Administrator of the Attorney Registration and Disciplinary Commission. See *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1978).

49. *Friedman*, 76 Ill. 2d at 394, 392 N.E.2d at 1334.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The actual payment of the bribe occurred in a washroom adjacent to the courtroom. The attorney placed \$50 into the officer's pocket and the officer handed the attorney a grand jury subpoena. *Howard*, 69 Ill. 2d at 346-47, 372 N.E.2d at 372.

she dropped the pending charges.⁵⁴ Again, Friedman directed the officer to accept the bribe.⁵⁵ If called as a witness at the preliminary hearing, the officer was to testify that the third-party complainant was not in court and no longer wanted to press charges.⁵⁶ Friedman, prior to the hearing, led the complainant into the State's Attorney's offices where she remained until the hearing was over.⁵⁷ The court required the officer to verify under oath that the complainant desired to drop the charges.⁵⁸ Again, the court was informed of the deception immediately after the hearing.⁵⁹ In his car outside the courthouse, the defendant's attorney paid to the officer the bribe and this attorney, too, was later indicted for bribery.⁶⁰

In 1976, the Administrator of the Attorney Registration and Disciplinary Commission filed a two-count complaint against Morton Friedman on the grounds that his conduct in deceiving the court tended to bring the legal profession into disrepute and violated four Disciplinary Rules of the Model Code.⁶¹ Specifically, the conduct was alleged to violate DR 1-102(A)(4), conduct involving dishonesty or deceit; DR 7-102(a)(4), use of perjured testimony; DR 7-102(A)(6), creation of false evidence; and DR 7-109(B), secreting of witnesses.⁶² The hearing board, the disciplinary equivalent of a trial court,⁶³ found that Friedman's conduct

54. *Friedman*, 76 Ill. 2d at 394, 392 N.E.2d at 1334. This attorney was subsequently convicted of criminal bribery, unlike the attorney in *Howard* who was acquitted of the same charge. See *People v. Powell*, 72 Ill. 2d 50, 377 N.E.2d 803 (1978).

55. *Friedman*, 76 Ill. 2d at 394-95, 392 N.E.2d at 1334.

56. *Id.* at 395, 392 N.E.2d at 1334.

57. *Id.*

58. *Id.*

59. *Id.*

60. *People v. Powell*, 72 Ill. 2d 50, 377 N.E.2d 803 (1978).

61. Briefly, the Illinois disciplinary system works as follows: An inquiry board, after receiving information of suspected misconduct by an attorney from a commission administrator, investigates the misconduct and decides whether a formal complaint should be filed with the hearing board. ILL. REV. STAT. ch. 110A § 753(a) (1983). The hearing board evaluates the evidence of misconduct, makes findings of fact and law, and determines whether the attorney should be disciplined. *Id.* § 753(c). The review board then reviews decisions made by the hearing board. Five of the nine members of the review board must concur to reach a decision. *Id.* § 753(d). A review board decision may be appealed to the Illinois Supreme Court, although review is discretionary. *Id.* § 753(e)(5), (6).

In *Friedman*, the hearing board found no code violations. The administrator filed exceptions with the review board which, by a five-to-three majority, found that the code had been violated and recommended censure. Friedman then appealed to the Illinois Supreme Court. *Friedman*, 76 Ill. 2d at 393, 392 N.E.2d at 1333.

62. See *supra* note 42.

63. ILL. REV. STAT. ch. 110A § 753(c) (1983).

did not violate the Code.⁶⁴ The Administrator appealed to the review board⁶⁵ which made a contrary determination and decided to censure Friedman.⁶⁶ The Illinois Supreme Court subsequently granted Friedman's petition for leave to appeal.

The Opinions of In re Friedman

In *In re Friedman* the petitioner, Friedman, admitted that his conduct violated the express provisions of four Model Code sections.⁶⁷ Friedman, however, defended his conduct on two grounds. First, Friedman analogized his conduct to the court-tolerated deceit used in narcotics investigations and from this analogy he concluded that "the courtroom is not immunized by the Code of Professional Responsibility from investigation methods otherwise lawful and ethical."⁶⁸ In his second argument, Friedman contended that the Model Code contained an implied good-motive defense or exception which excused technical violations of the Model Code such as his.⁶⁹

Six justices⁷⁰ participated in the *Friedman* decision and the case consists of four separate opinions: the lead opinion by two justices;⁷¹ a concurring opinion also by two justices;⁷² and two dissenting opinions.⁷³ The lead opinion stated that Friedman's conduct violated the Model Code but that Friedman did not deserve to be censured because he acted without the benefit of precedent or settled opinion.⁷⁴ The concurring justices joined the lead opinion

64. *Friedman*, 76 Ill. 2d at 393, 392 N.E.2d at 1333.

65. ILL. REV. STAT. ch. 110A § 753(d), (e) (1983).

66. *Friedman*, 76 Ill. 2d at 393, 392 N.E.2d at 1333.

67. *Friedman*, 76 Ill. 2d at 395, 392 N.E.2d at 1334; see *supra* note 42.

68. *Friedman*, 76 Ill. 2d at 395-96, 392 N.E.2d at 1334.

69. *Friedman*, 76 Ill. 2d at 396, 392 N.E.2d at 1334-35.

70. The seventh member of the court, Justice Ward, took no part in the consideration or decision of the case. *Friedman*, 76 Ill. 2d at 405, 392 N.E.2d at 1339.

71. Chief Justice Goldenhersh authored the lead opinion, in which Justice Kluczynski joined. *Friedman*, 76 Ill. 2d at 392, 392 N.E.2d at 1333.

72. Justice Underwood wrote the concurring opinion in which Justice Ryan joined. *Friedman*, 76 Ill. 2d at 399, 392 N.E.2d at 1336 (Underwood and Ryan JJ., concurring).

73. The first dissent was written by Justice Clark. *Friedman*, 76 Ill. 2d at 406, 392 N.E.2d at 1339 (Clark, J., dissenting). Justice Moran wrote the second dissent. *Friedman*, 76 Ill. 2d at 411, 392 N.E.2d at 1342 (Moran, J., dissenting).

74. In finding a Model Code violation, Chief Justice Goldenhersh stated: "The integrity of the courtroom is so vital to the health of our legal system that no violation, no matter what its motivation, can be condoned." *Friedman*, 76 Ill. 2d at 398, 392 N.E.2d at 1335. In support of the decision not to censure Friedman, Chief Justice Goldenhersh stated: "Because respondent acted without the guidance of precedent or settled opinion and because there is apparently considerable belief . . . that he acted properly in conducting the investigations, we conclude that no sanction should be imposed." *Id.* at 398-99, 392 N.E.2d at 1336.

only in their decision not to censure Friedman, and added that his conduct did not violate the Model Code.⁷⁵ In contrast, the dissenting justices found not only that Friedman's conduct violated the Model Code but also that he should be censured.⁷⁶

The lead opinion rejected Friedman's argument that his conduct was analogous to court-tolerated deceit often employed in narcotics investigations.⁷⁷ These justices noted that the deceit used in narcotics investigations occurs outside the courtroom and thus is not subject to the Model Code as is the in-court deceit employed by Friedman.⁷⁸ Moreover, the justices condemned Friedman's argument as one which used the ends to justify the means.⁷⁹

The concurrence, joining the lead opinion only in the decision not to censure, stated that the motive of the attorney employing these techniques should be taken into account when determining whether there were any Model Code violations.⁸⁰ Because there

75. Justice Underwood stated in the concurrence: "while I do not join in the findings of impropriety contained in the Chief Justice's [lead] opinion, I do join in discharging respondent, rather than dismissing the complaint, so that we may have the constitutionally required concurrence of four members in the action to be taken (ILL. CONST. art. VI, § 3)." *Friedman*, 76 Ill. 2d at 399, 392 N.E.2d at 1336 (Underwood, J., concurring).

76. In his dissent, Justice Moran agreed with the reasoning of the lead opinion, merely dissenting from the decision not to censure. *Friedman*, 76 Ill. 2d at 411, 392 N.E.2d at 1342 (Moran, J., dissenting). Justice Clark, in his dissent, felt that Friedman's conduct violated the Model Code, although his reasoning did not parallel the lead opinion's. Like Justice Moran, Justice Clark also felt that Friedman should be censured. *Friedman*, 76 Ill. 2d at 407-08, 392 N.E.2d at 1340 (Clark, J., dissenting).

77. Friedman analogized his conduct to that employed by the law enforcement officers in *Sorrells v. United States*, 287 U.S. 435 (1932). *Friedman*, 76 Ill. 2d at 395, 392 N.E.2d at 1334. Friedman argued that "the courtroom is not immunized by the Code of Professional Responsibility from investigation methods otherwise lawful and ethical." *Friedman*, 76 Ill. 2d at 395-96, 392 N.E.2d at 1334. Friedman built on this argument by proposing that his motive and intent should be taken into account and should negate any technical violation of the Model Code. *Id.* at 396, 392 N.E.2d at 1334-35.

78. Justices Goldenherhsh and Kluczynski, after noting that Friedman admitted that, but for his motives, his actions would violate the Model Code, flatly rejected this argument. They emphatically stated: "even if no other ways existed to ferret out the bribery, the respondent would still not be privileged to engage in unethical (and perhaps illegal) conduct." *Friedman*, 76 Ill. 2d at 398, 392 N.E.2d at 1336.

79. *Id.* at 397, 392 N.E.2d at 1335. These justices quoted Justice Brandeis' famous words from *Olmstead v. United States*, 277 U.S. 438 (1928); see *supra* note 33.

80. The concurring opinion suggested that a good-motive defense, to what otherwise would be a Model Code violation, is implicitly included in the Model Code. *Friedman*, 76 Ill. 2d at 400, 392 N.E.2d at 1336 (Underwood and Ryan, JJ., concurring). In support of this position, the opinion cites to a noted scholar in the field of professional responsibility, Monroe Freedman. "Motive is, of course, a primary consideration in making judgments regarding the ethical quality of conduct." M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 83 (1975). Both dissents noted that the Model Code does not consider good motive or intent as a defense to a violation of the Disciplinary Rules. See *infra* note 83 and accompanying text.

was considerable evidence showing that Friedman's conduct was guided by good motives, these justices decided that there were no violations of the Model Code.⁸¹

The first dissent, which found that Friedman's conduct violated the Model Code, felt that even temporary deception of a court was impermissible.⁸² While both dissents rejected the concurring opinion's reasoning that motive should be taken into account,⁸³ the first dissent noted that Friedman could have avoided deceiving the court, and therefore violating the Model Code, by informing the court of the planned deception ahead of time.⁸⁴ The second dissent agreed completely with the reasoning of the lead opinion, dissenting only from the decision not to censure Friedman.⁸⁵

The Greylord Guidelines

Until *Friedman*, no case had dealt with the issue of whether in-court undercover techniques could be justified when employed in

81. *Friedman*, 76 Ill. 2d at 405, 392 N.E.2d at 1339 (Underwood and Ryan, JJ., concurring). The concurring justices also expressed fear that by holding Friedman's conduct to be in violation of the Model Code, all corrupt lawyers would be immune from investigation and prosecution. *Id.* at 404-05, 392 N.E.2d at 1338-39 (Underwood and Ryan, JJ., concurring).

82. Justice Clark stated: "It is not within the province of any attorney, including one who represents the State, to determine whether the public interest requires the temporary deception of the court." *Friedman*, 76 Ill. 2d at 407, 392 N.E.2d at 1340 (Clark, J., dissenting).

83. Justice Clark noted that there are no exemptions from the Model Code for good intent or motive and that deception of a court, even if a prosecutor's statutory duties authorize him to use deception, is impermissible. *Id.* at 411-12, 392 N.E.2d at 1340 (Clark, J., dissenting). Justice Moran explicitly stated "[t]hat respondent might be excused because his motives were pure is an untenable defense, particularly when intent is not an element of the charge here raised against him." *Id.* at 412, 392 N.E.2d at 1342 (Moran, J., dissenting).

84. The concluding paragraph of Justice Clark's dissent illustrates how he thinks Model Code violations can be avoided:

Finally, even if the respondent had in good faith believed that, for some as yet unarticulated reason, he could not talk to the trial judge, he should not have taken it upon himself to decide whether the temporary deception of the trial judge was appropriate. He should have had the common sense and ethical circumspection to have brought his dilemma to the attention of the presiding judge of the criminal division, or the chief judge of the circuit court, or if the foregoing were for some reason inappropriate, to this court itself, which has supervisory powers over the circuit courts. He did not do so; he thus usurped the role of the courts through deceiving a trial judge, albeit temporarily, and his conduct merits censure.

Friedman, 76 Ill. 2d at 411, 392 N.E.2d at 1342 (Clark, J., dissenting).

85. In a short dissent, Justice Moran agreed with the rationale of the lead opinion, disagreed strongly with the concurrence, and generally condemned Friedman's conduct. *Friedman*, 76 Ill. 2d at 411-13, 392 N.E.2d at 1342-43 (Moran, J., dissenting).

an official investigation.⁸⁶ As a result of *Friedman*, in which a majority of the court decided that this type of conduct violated the Model Code,⁸⁷ the U.S. Attorney for the Northern District of Illinois developed six protective guidelines.⁸⁸ The U.S. Attorney faced an investigation of serious corruption in the judiciary without precedent to guide him. He believed that undercover government attorneys acting within the strictures of these guidelines, would not violate the Model Code and would avoid the problems addressed in *Friedman*.⁸⁹

The six guidelines developed by the U.S. Attorney's office can be labelled Necessity, Targeting, Case Selection, Supervision, Minimization, and Notification.⁹⁰ With the exception of Notification, these guidelines appear to be drawn from the findings made by the hearing board, which findings were reproduced in full in the concurring opinion in *Friedman*.⁹¹ The Notification guideline addresses problems raised by Justice Clark in his dissent in *Friedman*.⁹² Apparently, neither the lead opinion nor the remaining dissent are directly addressed or represented in the guidelines.⁹³

The first guideline, Necessity, provides that *Friedman*-type deception can only be used if absolutely required. It may be employed only if there is no feasible alternative method for obtaining the evidence necessary to prosecute.⁹⁴ This first guideline is apparently drawn from the finding of the hearing board which noted that Friedman had no alternative way of obtaining evidence adequate to

86. See *supra* note 45.

87. See *supra* notes 74-76 and accompanying text; see also Sullivan Lecture, *supra* note 11, at 437.

88. See *infra* notes 94-103 and accompanying text.

89. Mr. Sullivan stated in his lecture that "I have isolated six standards which I think must be met if this kind of investigation is to adhere to the Code of Professional Responsibility and satisfy the problems raised by the majority of justices in the *Friedman* case." Sullivan Lecture, *supra* note 11, at 439.

90. Sullivan Lecture, *supra* note 11, at 439-440.

91. See *infra* notes 94-103 and accompanying text. The complete findings of the hearing board are reproduced in the concurring opinion. *Friedman*, 76 Ill. 2d at 401-03, 392 N.E.2d at 1337-38 (Underwood and Ryan, JJ., concurring). The hearing board held that Friedman's conduct did not violate the Model Code. This holding was subsequently overturned by the review board. See *supra* note 61.

92. See *infra* notes 104-05 and accompanying text; see also *supra* note 85.

93. The lead opinion and Justice Moran's dissent, which agreed with the reasoning of the lead opinion, would probably not accept the guidelines because these justices are unlikely to allow *Friedman*-type deception. See *supra* notes 78 & 85 and accompanying text.

94. Sullivan Lecture, *supra* note 11, at 439.

prove the guilt of the corrupt attorneys.⁹⁵

The second guideline, Targeting, requires that *Friedman*-type deception be used only when investigating individuals against whom considerable evidence of criminal activity has already been obtained.⁹⁶ This guideline is also apparently based upon the finding of the hearing board which noted that the attorneys in the *Friedman* investigations had not been randomly chosen and entrapped by Friedman, but rather, had been targeted only after they had initiated the bribery schemes.⁹⁷

The third guideline is Case Selection. The cases in which *Fried-*

95. *Friedman*, 76 Ill. 2d at 401-02, 392 N.E.2d at 1337 (Underwood and Ryan, JJ., concurring).

Bennett Gershman of Pace University, who has also proposed a series of guidelines to control the use of undercover techniques, which unlike the Greylord guidelines do not focus on the courtroom but would apply to the use of these techniques generally, included as one of his six guidelines "The Necessity for the Operation." Gershman, *supra* note 14, at 616-19. Gershman states that: "If the investigative procedure is not necessary to achieve legitimate law enforcement goals, its use may not be a proper exercise of government power, particularly if the deceptive techniques invade the privacy of the individual under investigation." *Id.* at 616. It should be noted that Gershman's guidelines derive from and try to give effect to the Supreme Court's due process analysis set out in *United States v. Russell*, 411 U.S. 423 (1973). See *supra* notes 23-24 and accompanying text. See generally Gershman, *supra* note 14.

The Attorney General's Guidelines on General Crimes also deals with the necessity of using undercover-type techniques before an investigation has begun.

Before employing an investigative technique in an inquiry, the FBI should consider whether the information could be obtained in a timely and effective way by less intrusive means. Some of the factors to be considered in judging intrusiveness are adverse consequences to an individual's privacy interests and avoidable damage to his reputation. Whether an intrusive technique should be used in an inquiry depends on the seriousness of the possible crime and the strength of the information indicating the possible existence of the crime.

Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 806 (1984) (quoting The Attorney General's Guidelines on Racketeering Enterprise and Domestic Security/Terrorism Investigations (Mar. 7, 1983), issued as Department of Justice Press Release, Mar. 7, 1983, § II.B.4 [hereinafter cited as "Attorney General's Guidelines"]). One scholar recently developed an analysis to be applied in order to justify the use of undercover techniques. The analysis characterizes six dimensions which determine whether the techniques are too intrusive when balanced against civil liberty and due process concerns. The dimensions are:

(1) the extensiveness of the [investigation]. . . ; (2) the intensiveness of the [investigation] . . . ; (3) whether the focus [of the investigation] is on persons or on time, place and activity; (4) the covertness or deceptiveness of the information gathering; (5) the size and character of inducements offered to witnesses or victims of offenses; and (6) the government's role in instigating or facilitating the offense.

Moore, *Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement*, in AB-SCAM ETHICS, *supra* note 31, at 17, 28.

96. Sullivan Lecture, *supra* note 11, at 439.

97. The following is a quotation of the relevant portion of the hearing board's fourth paragraph:

man-type deception is used must be contrived carefully to avoid undue risk of harm to third parties.⁹⁸ This guideline is drawn from the hearing board's findings that Friedman's conduct did not prejudice or injure the court, the people of Illinois, or the defendants.⁹⁹

There was no practical alternative method available to the State's Attorney's office to obtain the type of evidence (the payment of money) which experience had shown was indispensable in order to prove the guilt of corrupt attorneys. *Friedman*, 76 Ill. 2d at 401-02, 392 N.E.2d at 1337 (Underwood and Ryan, JJ., concurring).

The problems related to target selection are discussed at great length in *ABSCAM ETHICS*, *supra* note 31; see *Sherman, From Whodunit to Who Does It: Fairness and Target Selection In Deceptive Investigations*, in *ABSCAM ETHICS*, *supra* note 31, at 118; see also *Marx, Who Really Gets Strung? Some Issues Raised by the New Police Undercover Work*, 28 *CRIME & DELINQ.* 165 (1982), reprinted in *ABSCAM ETHICS*, *supra* note 31, at 65. Gershman also addresses the targeting problem under his guideline entitled "Factual Justification." He states:

If the government bases its undercover investigation on facts indicating present criminal activity, or suggesting that a particular individual is about to commit a crime, the government is not overreaching in affirmatively soliciting particular groups or individuals; there is no danger of arbitrary prosecution. If the government bases its investigation on facts that indicate that official corruption exists, but that fail to identify particular individuals, the government does not violate due process as long as it does not actively target any particular person.

Gershman, *supra* note 14, at 612-13.

With regard to what is required to initiate an investigation against an individual, the Attorney General's Guidelines provide that the standard to be used is "reasonable indication":

The standard of "reasonable indication" is substantially lower than probable cause. In determining whether there is reasonable indication of a federal criminal violation, a Special Agent may take into account any facts or circumstances that a prudent investigator would consider. However, the standard does require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient.

Elliff, *supra* note 95, at 799, (quoting Attorney General's Guidelines, *supra* note 95, at § II.C.1.)

In light of the preceding quotation, consider FBI Director William Webster's comment on the Abscam investigation: "We're only investigating people who we have reason to believe are engaged or *would like to engage in a crime*." *Washington Post*, March 22, 1982, at A2 (emphasis added); see also *Select Committee on Undercover Activities*, *supra* note 35, at 56-77.

98. Sullivan Lecture, *supra* note 11, at 439.

99. The first paragraph of the hearing board's findings states:

Respondent did not entrap or attempt to entrap attorneys Powell and Howard. On the contrary, attorneys Powell and Howard initiated and were responsible for the bribery scheme.

Friedman, 76 Ill. 2d at 401, 392 N.E.2d at 1337.

What Mr. Sullivan calls "Case Selection" is addressed in part in two of Gershman's guidelines. The first, entitled "Societal Harm," addresses the use of fictitious court proceedings:

The use of fictitious court proceedings and the grand jury to establish the credentials of undercover agents in preparation for the exposure of corruption does not . . . appear inherently evil or improper. The staged arrest undoubt-

The fourth guideline, Supervision, requires that cases which involve *Friedman*-type deception should be closely and carefully monitored. Freedom of action by all those involved in the deception should be kept to a minimum.¹⁰⁰ The source of this guideline is apparently the hearing board's finding that it was Friedman himself, and not the police officers, who supervised the gathering of the evidence against the attorneys and who determined the nature and extent of the false testimony and the unavailability of witnesses.¹⁰¹

The fifth guideline is Minimization. This guideline states that *Friedman*-type deception must be kept to a minimum; once a provable case is made against an individual, the investigation against that individual must cease.¹⁰² Although this guideline does not appear to be drawn directly from any of the hearing board's findings, it is a natural extension of the protections afforded by the first three

edly affects the publicly perceived integrity or impartiality of the system . . .
[b]ut one must balance this nebulous harm against the benefits derived from
eradicating misconduct from that system.

Gershman, *supra* note 14, at 628.

The second Gershman guideline that resembles "case selection" is entitled "Violation of Individual Rights." This guideline concerns the risk of harm to third parties:

A difficult question arises, however, if the undercover activity invades the rights of a third party, not the rights of the defendant. Ordinarily, rights are personal, and only the person aggrieved may claim a violation of those rights. The government's violation of the rights of a third party, however, ought to be a relevant consideration in assessing, under due process, the overall fairness of the investigative conduct.

Id. at 629.

100. Sullivan Lecture, *supra* note 11, at 440.

101. The third paragraph of the hearing board's findings states:

A responsible attorney in the State's Attorney's office supervised the gathering of the evidence against attorneys Powell and Howard. No free rein was given to police officers or laymen to determine what testimony would be given in court, what witnesses would be made available, or what other steps would be taken in court in order to gather evidence against attorneys Howard and Powell.

Friedman, 76 Ill. 2d at 401. 392 N.E.2d at 1337.

While none of Gershman's guidelines deal directly with supervision, it is an end at which his guidelines aim. The Gershman guidelines are designed as criteria to be met prior to the issuance of what Gershman describes as a special search warrant which allows the use of undercover techniques.

If government officials routinely applied for staged arrest warrants that set out their factual predicate, their investigative alternatives, the details of the manufactured crime and its predicted progression through the judicial system, their solicitation methods, and their predicted involvement in the crime under investigation, the warrants would mitigate the abuses to which staged arrests are prone.

Gershman, *supra* note 14, at 634-35.

See also *Select Committee on Undercover Activities*, *supra* note 35, at 30-31.

102. Sullivan Lecture, *supra* note 11, at 440.

guidelines. Necessity, Targeting, and Case Selection all limit the possible harm caused by *Friedman*-type deception.¹⁰³

The sixth guideline, Notification, requires that persons in authority in the judicial and law enforcement branches be informed of the investigation, including the intended use of *Friedman*-type deception.¹⁰⁴ This guideline addresses the problems concerning Friedman's conduct expressed by Justice Clark in his dissent. According to Justice Clark, Friedman would not have violated the Model Code if he had notified in advance the presiding judge of the criminal division or the chief judge of the circuit court of his activities.¹⁰⁵

ANALYSIS

The U.S. Attorney's Office formulated its guidelines¹⁰⁶ after concluding that, under *Friedman*, undercover techniques may be used in the courtroom if certain precautions are taken.¹⁰⁷ This conclu-

103. See *supra* notes 94-99 and accompanying text.

Gershman includes the Greylord guideline of Notification within his "Minimization of Harm" guideline. One way of minimizing the harm caused by a staged arrest is to limit the deception by informing those in authority of the investigation. Gershman, *supra* note 14, at 632.

The fifth paragraph of the hearing board's findings is reproduced below along with the sixth paragraph to which the fifth paragraph makes reference:

5. Respondent's conduct did not deceive, prejudice or injure the Court, the People, or the defendants in the two cases. The respective courts were not deceived because of the prompt action taken by Respondent set forth in paragraph 6.

6. The Respondent made a prompt disclosure of the true facts to the court after the dismissal of each case, and thus allowed the judge to act promptly in the event the judge felt that the Respondent's conduct had been contemptuous or that any other action should be taken under the circumstances.

Friedman, 76 Ill. 2d at 402, 392 N.E.2d at 1337.

Gershman's sixth guideline, entitled "Minimization of Harm," is almost the mirror image of Sullivan's Minimization guideline. The only difference is that Gershman's is directed towards preventing due process violations, and the Greylord guideline is directed towards preventing Model Code violations. Gershman states:

In evaluating whether the government violated due process, one should consider its attempts to limit harmful consequences to societal and to individual rights, because such attempts shed light on the fairness of the procedure and the motives of the government agency.

Gershman, *supra* note 14, at 631.

104. Sullivan Lecture, *supra* note 11, at 440.

105. See *supra* note 84 and accompanying text.

106. See *supra* notes 94-105 and accompanying text.

107. Mr. Sullivan stated in his lecture:

When the investigation involves the court system, as this [Greylord] did, unique problems are involved because the Code of Professional Responsibility prohibits misleading the Court, submitting perjured testimony or false evidence.

And the Illinois Supreme Court has ruled on that subject in the case of *In re*

sion, however, does not seem to be warranted by the *Friedman* case because four justices decided that Friedman's conduct violated the Model Code.¹⁰⁸ Moreover, three of these justices would never allow the use of undercover techniques in the courtroom regardless of how necessary these methods were and what precautions were taken.¹⁰⁹ Consequently, because the guidelines could not garner the support of a majority of the *Friedman* justices, they in all likelihood will fail to prevent Model Code violations when undercover techniques are employed in the courtroom.¹¹⁰

The guidelines would be able to garner the support of a majority of the *Friedman* justices only if the Model Code contained an implied good-motive exception for apparent Model Code violations such as Friedman's.¹¹¹ Otherwise, Friedman's conduct and similar conduct technically violates the express provisions of the four noted Model Code sections.¹¹² However, only the two concurring justices interpreted the Model Code as containing an implied good-motive exception;¹¹³ the other four justices rejected this interpretation and, consequently, decided that Friedman violated the Model Code.¹¹⁴

Of the four justices who rejected the good-motive exception only Justice Clark might be persuaded to allow the use of undercover techniques in the courtroom.¹¹⁵ Justice Clark reasoned that if the court were informed in advance of the planned use of undercover techniques, the deception which the Model Code was intended to

Morton Friedman, 76 Ill. 2d 392, a case that was decided in 1979 while this matter was under consideration and review in the United States Attorney's office.

Sullivan Lecture, *supra* note 11, at 14, lines 7-16. Mr. Sullivan also indicated that, by using his guidelines, the difficulties expressed by the justices in *Friedman* can be solved so that undercover techniques could be used in court without violating the Model Code. See *supra* note 89.

108. See *supra* notes 77-79 & 82-85 and accompanying text.

109. These justices include Chief Justice Goldenhersh, Justice Kluczynski, and Justice Moran. See *supra* notes 77-79 & 85 and accompanying text. See also *infra* note 118.

110. The Illinois Supreme Court follows the practice of the United States Supreme Court when there is no quorum majority in favor of a particular disposition by affirming the decision of the lower court without giving it precedential value. *Perlman v. First Nat'l Bank of Chicago*, 60 Ill. 2d 529, 530, 331 N.E.2d 65, 66 (1975).

Illinois disciplinary cases do have precedential weight, but the specific discipline to be imposed in each case must be judged individually, based on the circumstances involved. *In re Kien*, 69 Ill. 2d 355, 360-62, 372, 362 N.E.2d 378-79, (1977); *In re Howard*, 69 Ill. 2d 343, 354, 372 N.E.2d 371, 375 (1978).

111. See *supra* notes 80 and accompanying text.

112. See *supra* notes 41-42 and accompanying text.

113. See *supra* note 80 and accompanying text.

114. See *supra* notes 77-79 & 82-85 and accompanying text.

115. See *supra* notes 82-84 and accompanying text.

prevent would be eliminated.¹¹⁶ There could be, therefore, no code violation.¹¹⁷ The sixth Greylord guideline, Notification, seems to address this problem adequately.¹¹⁸

Even if *Friedman* had the effect of binding precedent on the issue of whether undercover techniques could ever be used in the courtroom,¹¹⁹ the Greylord guidelines still could not claim the support of a majority of the justices for the proposition that these techniques could be used.¹²⁰ The guidelines might garner the support of three justices, but would need the support of four to effectively prevent Model Code violations.¹²¹

Moreover, since *Friedman* does not have the effect of binding precedent, the *Friedman* justices are not bound by the views which they expressed in that case.¹²² While these views offer guidance as to how the court would decide whether undercover techniques could ever be used in the courtroom without violating the Model Code, reliance solely upon these views may be imprudent if it is to continue over an extended period of time. The possibility that the judges' views of the issue will change, combined with the inevitability that the composition of the court will change over time, creates uncertainty as to whether a future *Friedman*-type case would be decided in the same way.¹²³

116. *Id.*

117. *Id.*

118. See *supra* notes 104-05 and accompanying text.

Mr. Sullivan stated in his lecture that high ranking members of the judiciary must be informed of the investigation and the planned use of *Friedman*-type deception. Sullivan Lecture, *supra* note 11, at 00. The chief judge of the United States district court in Chicago and the chief judge of the criminal court in Cook County were notified of the Greylord investigations. *Id.* at 00. The Notification guideline easily satisfies Justice Clark's difficulties with Friedman's conduct: "He [Friedman] should have had the common sense and ethical circumspection to have brought his dilemma to the attention of the presiding judge of the criminal division, or the chief judge of the circuit court. . . ." *Friedman*, 76 Ill. 2d at 411, 392 N.E.2d at 1342 (Clark, J., dissenting).

119. See *supra* notes 74-85 and accompanying text. The concurring opinion, which contains the views of Justices Underwood and Ryan, joined the lead opinion only in the decision not to censure Friedman. Thus, the votes of the four justices who decided that Friedman's conduct violated the Model Code were split between the lead opinion and the two dissents. *Id.*

120. *Id.*

121. Since the Notification guidelines seems to satisfy the problems raised by Justice Clark's dissent, he can be counted along with the two concurring justices as allowing the use of undercover techniques in the courtroom. See *supra* notes 75, 84, & 104-05 and accompanying text.

122. See *supra* note 110.

123. At the time of this writing, two *Friedman* justices, Justices Kluczynski and Underwood, are no longer with the court.

IMPACT AND ALTERNATIVES

The Greylord guidelines would probably be of great use in the legislative process. They could become part of a good-motive exception amendment to the Model Code. The protections and controls which they provide over the use of undercover techniques would probably have to be part of such an amendment in order to insure its passage.¹²⁴ In fact, because of attention which the use of undercover techniques has drawn recently,¹²⁵ the passage of a good-motive exception amendment would be highly improbable without some guaranteed safeguards against the misuse of undercover techniques.

The Greylord Guidelines could perform this safeguarding function admirably. Indeed, the guidelines compare very favorably with other measures which have been proposed for controlling the use of undercover techniques.¹²⁶ The United States Senate is currently considering protective measures consisting both of statutory provisions and proposed guidelines to control the federal use of undercover techniques.¹²⁷ These measures seek to strike a balance between the tyranny of unchecked crime and the tyranny of unchecked government intrusion.¹²⁸ Even more recently, a noted scholar drafted for legislative consideration guidelines aimed at the same purpose and very similar to the Greylord guidelines.¹²⁹

While this note has criticized the effectiveness of the Greylord guidelines, it does not intend to question what is perhaps the underlying premise—that undercover techniques in the courtroom are necessary for effective law enforcement. Indeed, this note recommends a good-motive exception amendment to the Model Code which includes the Greylord guidelines or similar protective measures.

CONCLUSION

The recent Operation Greylord Investigation evidenced the need to employ undercover techniques in the courtroom. At present, however, the use of these techniques in the courtroom technically violates various provisions of the Model Code of Professional Re-

124. The criticism which the uncontrolled use of undercover techniques has caused would in all likelihood prevent the passage of such an amendment without guaranteed safeguards. See *supra* notes 31-35 and accompanying text.

125. *Id.*

126. See *supra* notes 94-105 and accompanying text.

127. See *supra* note 35.

128. *Id.*

129. See Gershman, *supra* notes 14 & 94-105.

sponsibility. In order to avoid these violations a good-motive exception must be added to the Illinois Code.

Although the Greylord guidelines do not succeed in preventing Model Code violations when undercover techniques are used in the courtroom as intended, these guidelines still could make a valuable contribution to the passage of a good-motive exception amendment. The guidelines would provide the safeguards against the misuse of these techniques and which must accompany such an amendment in order to insure its passage.

ANDREW MAJESKE

