

Introduction

The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) has prepared this report on the Proposed Amendment to Rule of Professional Conduct 8.4 Regulating Lawyer’s Supervision of Undercover Investigations (the “Proposed Amendment”) issued by the Professional Responsibility, Professional Ethics and Professional Discipline Committees of the Association of the Bar of the City of New York (the “City Bar”).¹ The Proposed Amendment is set forth herein.

The Proposed Amendment seeks to address, by modifying New York Rule of Professional Conduct 8.4 (which prohibits a lawyer from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation”), the legislatively unresolved issue of whether and to what extent a lawyer may ethically employ deceptive practices during an undercover investigation or supervise and/or direct the deceptive conduct of others during such an investigation. In substance, the Proposed Amendment provides that a lawyer may give advice to non-attorney investigators and supervise the conduct of an otherwise lawful undercover investigation.

For the reasons set forth below, the Section recommends endorsing the Proposed Amendment with certain modifications.

Background of the Proposed Amendment

As explained by the City Bar, the issue of whether an attorney may ethically engage in an undercover investigation involving deception is not novel to New York. Many other states, including Colorado, Oregon, Virginia, Illinois, Utah and the District of Columbia have addressed the issue in various ways by considering both status and conduct-based factors.²

Rejecting the notion that a purposeful deceit by an attorney can ever be condoned under any circumstance, Colorado’s Supreme Court has endorsed a blanket prohibition against the use of deceptive tactics – whether or not the deception is practiced directly by an attorney, or indirectly, through an attorney’s agent. *See People v. Palter*, 35 P.3d 571 (Colo. O.P.D.J. 2001), *aff’d* 47 P.3d 1175 (Colo. 2002) (affirming disciplinary sanctions against a prosecutor who pretended to be a public defender to a suspect who refused to surrender until he spoke with a public defender). Specifically, the Colorado Court stated that “anyone who is admitted to the

¹ Opinions expressed in this report are those of the Section and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association’s House of Delegates or Executive Committee.

² Status-based factors focus on the subject matter of a case (i.e. the substantive area of law at issue) or the status of an attorney’s client. Conduct-based factors consider the level of attorney participation in the investigation, the significance, degree and necessity of the deception, and whether it is otherwise illegal or unethical. *See generally*, Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status Based Ethical Analysis*, 32 Seattle U. L. Rev. 123 (2008).

practice of law” must adhere to the Colorado Rules of Professional Conduct that prohibit an attorney from (i) engaging in conduct “involving dishonesty, fraud, deceit or misrepresentation” and (ii) communicating with an unrepresented person without explaining that the attorney “is representing a client” and is not disinterested. Id. at 577, 579, 581. Evidence of justification, or motive, may not be used to create exceptions to these Rules. If such evidence “may be considered at all in a disciplinary proceeding against an attorney, it is limited to a consideration of mitigation for the misconduct undertaken.” Id. at 581.

By contrast, Oregon, Iowa, Virginia and Florida have adopted ethical rules that permit some limited deception by attorneys. Specifically, Oregon’s Rule 8.4(a)(3) prohibits direct deception by an attorney but allows a lawyer – regardless of the substance of the underlying claim – to advise on or supervise undercover activity. (Iowa’s rule on the issue is similar to Oregon’s.) Virginia’s Rule 8.4(c) permits some deception as a lawyer, as long as such conduct does not reflect adversely on a lawyer’s fitness to practice law. Florida’s Rule 4-8.4 only permits attorneys who work for a criminal law enforcement agency or regulatory agency to participate, advise about or supervise an undercover investigation.

Another approach to the issue, employed by the bars of the District of Columbia, Utah and New Jersey, exempts only government lawyers and their investigations from the reach of ethical rules prohibiting deceptive conduct. So, for example, the bar of the District of Columbia has stated that the conduct proscribed by Rule 8.4(c) of District of Columbia’s Rules of Professional Conduct does not prohibit attorneys of the national intelligence agencies from using deception in furtherance of their official duties. In construing Rule 8.4(c), the District of New Jersey court in Apple Corps, Ltd. v. Int’l Collectors Society, 15 F. Supp. 2d 456 (D.N.J.1998) held that the rule did not apply to lawyers using undercover investigations to unearth ongoing violations of law where the deception practiced is “solely as to identity of purpose and solely for evidence gathering purposes.”

New York courts and the New York County Lawyers’ Association (“NYCLA”) have endorsed the indirect use of deception by an attorney – specifically, the engagement of investigators and testers by lawyers not only in the context of government investigations but also “when there is a legitimate public policy argument in favor of unearthing unlawful conduct that may not be susceptible to proof in any other way.” See e.g., Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (refusing to exclude evidence of trademark infringement obtained by private investigators who were hired by plaintiff and who posed as defendant’s customers in order to record evidence of defendant’s infringement) and NYCLA Committee on Prof’l Ethics, Formal Op. No. 737 (May 23, 2007). Formal Opinion 737 addressed the question “[u]nder what circumstances, if any, is it ethically permissible for a non-government lawyer to utilize the services of and supervise an investigator if the lawyer knows that dissemblance will be employed by the investigator?” In answering this question, NYCLA drew a distinction between conduct that would violate New York’s Disciplinary Rules prohibiting an attorney from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentations” and “dissemblance.” Dissemblance, according to NYCLA, as different from dishonesty, fraud, deceit or misrepresentations, “refers to misstatements as to identity and purpose made solely for gathering evidence” and “ends where misrepresentation or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and

unrepresented persons in violation of the Code[], or in evidence-gathering conduct that unlawfully violates the rights of third parties.” NYCLA ultimately endorsed a very limited ability of attorneys to supervise non-attorney investigators who employ “dissemblance” where “(i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyers’ conduct and the investigators’ conduct that the lawyer is supervising do not otherwise violate the Code (including but not limited to, DR 7-104, the “no-contact” rule or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.”

The City Bar, in considering the various approaches taken by other jurisdictions, found none to be entirely satisfactory. Among other issues, the City Bar disagreed with the status-based distinctions (i.e. focusing on the status of the attorney employing deceptive tactics) used by the District of Columbia because these distinctions lead to the inconsistent application of the jurisdiction’s Rules of Professional Conduct across attorneys. The City Bar further expressed the view that, despite the endorsement of certain deceptive practices by attorneys found in Gidatex and Formal Opinion 737, New York’s Rules of Professional Conduct run counter to their holdings and lack an express authorization of a lawyer’s supervision of agents who engage in deceptive conduct. Thus, the Proposed Amendment seeks to align the Rules of Professional Conduct with the state of the law in New York, as well as fill an existing gap in the law.

Summary of the Proposed Amendment

The Proposed Amendment modifies Rule 8.4 as follows in italics:

A lawyer or law firm shall not:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, *provided, however, that this Rule does not prohibit a lawyer from advising or supervising another in conducting an otherwise lawful undercover investigation that does not violate Rule 4.2.*

The Proposed Amendment includes the following comment:

[6A] Notwithstanding the general restriction against engaging in deceit, a lawyer may advise or supervise another who engages in an otherwise lawful and ethical undercover investigation, in which the investigator does not disclose his or her true identity and motivation, regardless of the nature of the matter or substantive area of law involved. This Rule does not effect any change in the scope of a lawyer’s obligations under Rule 4.2, and thus a lawyer must take reasonable measures so that the investigator does not communicate with a represented party in violation of Rule 4.2, does not seek to elicit privileged information and otherwise acts in compliance with these Rules, court orders and civil and criminal law.

According to the City Bar, the added language makes Rule 8.4 consistent with the actual practice of attorneys in New York. Specifically, this language expressly authorizes a lawyer to supervise others who may use deception during the course of undercover investigations – a

practice that is common place within certain areas of New York law and has, as discussed above, been implicitly condoned by New York courts (usually in connection with cases whose subject matter implicates public policy issues). Further, the Proposed Amendment brings Rule 8.4 roughly in line with the conclusion stated in NYCLA's Formal Opinion 737, which, as set forth supra, endorses an attorney's ability to ethically supervise non-attorney investigators who employ "a limited amount of dissemblance" in a narrow set of circumstances determined by various conduct and status-based factors.

Unlike the case law and the ethical opinion from NYCLA, however, both of which permit undercover investigations in civil rights and trademark cases, the Proposed Amendment applies to all substantive areas of the law. The investigatory latitude provided by the Proposed Amendment is circumscribed only by the requirement that the undercover investigation is "otherwise lawful and ethical."³

Recommendation of the Section

The Section agrees that, as stated in the Proposed Amendment, the suggested language synchronizes the "plain language of the [] NY Rules on the one hand, and well-established practices among prosecutors and civil lawyers in certain contexts, as well as judicial and other precedent, on the other." Further, the Section believes that the exclusion of a safe harbor for conduct that otherwise would violate Rule 4.2: Communication with Person Represented by Counsel, is an adequate protection from potential abuse of the Proposed Amendment regarding represented individuals. Finally, the Section agrees with the Proposed Amendment's focus on the "conduct of the attorney, rather than on the substantive nature of the claim."

However, the Section believes that this focus can be further sharpened and will more closely harmonize with (i) the existing case law in New York regarding the bounds of an attorney's participation in deception (see e.g., In the Matter of Malone, 105 A.D.2d 455; 480 N.Y.S. 603 (3d Dep't 1984) (disciplining a lawyer for instructing a witness to lie under oath); (ii) Rule 8.4(c); and (iii) the treatment of an attorney's use or supervision of the use of impersonation in other jurisdictions (and under federal law) (see e.g., People v. Palter, 35 P.3d 571 (Colo.O.P.D.J. 2001), aff'd 47 P.3d 1175 (Colo. 2002); Telephone Records and Privacy Protection Act of 2006)⁴), if the Proposed Amendment makes clearer that not all types of

³ The City Bar noted that case law in New York "suggests that the undercover investigations contemplated by the Proposed Amendment would not violate" Section 487 of New York's Judiciary Law (defining a misdemeanor and a private cause of action against an attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion") because New York courts have consistently construed Section 487 to apply only to attorneys who have repeatedly engaged in a pattern of extreme conduct. See Proposed Amendment at n. 30 (compiling New York cases construing Section 487 to apply only to "chronic and extreme pattern[s] of legal delinquency").

⁴ The Telephone Records and Privacy Act of 2006 provides, among other measures, for up to 10 years imprisonment as punishment for the practice of "pretexting" (i.e. pretending to be someone else or using other fraudulent means) to obtain confidential telephone records from telephone companies. At the time the law was passed, Hewlett – Packard ("HP") was embroiled in a controversy involving the use of pretexting. Investigators authorized by Hewlett-Packard posed as certain members of HP's board of directors to obtain their confidential telephone records. HP sought these records because it believed they would assist it in determining if these board members were leaking information to the press. HP's actions, which subjected HP and the individuals involved in the pretexting to criminal charges, significant monetary fines and other disciplinary measures, drew further attention to the issue of pretexting and highlighted the need for law prohibiting its use to obtain private and confidential records. See Barry

deception are permissible. Impersonation is a particularly dangerous form of deception, in which the person making the deception assumes the identity of another person. This can lead to invasions of privacy and unintentional disclosure of privileged information, as in the HP case, where the investigator impersonated board members to get their private telephone records, or in the case in Oregon where the prosecutor impersonated a defense attorney to obtain a confession under the guise of a privileged attorney-client communication. The Section believes that the comments to the Proposed Amendment should clarify that the amendment permits some deception but not all. While it permits deception that involves non-disclosure of the identity and motivation of the investigator, it does not permit impersonation, which is a crime. Therefore, the Section recommends changing the language in Proposed Comment 6A as set forth below and otherwise endorses the Proposed Amendment (additions in boldface):

*[6A] Notwithstanding the general restriction against engaging in deceit, a lawyer may advise or supervise another who engages in an otherwise lawful and ethical undercover investigation, in which the investigator does not disclose his or her true identity and motivation, regardless of the nature of the matter or substantive area of law involved. **However, conduct that violates the law, such as impersonation, which under the New York Penal Law involves assuming the identity of another person, a public servant, or a representative of another person or organization, would not be permissible.** This Rule does not effect any change in the scope of a lawyer's obligations under Rule 4.2, and thus a lawyer must take reasonable measures so that the investigator does not communicate with a represented party in violation of Rule 4.2, does not seek to elicit privileged information and otherwise acts in compliance with these Rules, court orders and civil and criminal law.*

R. Temkin, Deception in Undercover Investigations: Conduct-Based vs. Status Based Ethical Analysis, 32 Seattle U. L. Rev. 123, 123-124 (2008) (citing James B. Steward, The Kona Files, How an Obsession with Leaks Brought Scandal to Hewlett-Packard, THE NEW YORKER, Feb. 19 & 26, 2007, at 152, 159-60; Damon Darlin, Journalists Intend to Sue Hewlett-Packard Over Surveillance, N.Y. TIMES, May 7, 2007, at C4.