NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1297 (07/23/2026)

Topic: Advising private client regarding deceptive conduct while investigating alleged fraud involving federal government funds in violation of False Claims Act

Digest: Currently, no authority under the New York Rules of Professional Conduct (the "Rules") would permit the inquirer to induce, assist or supervise a client in engaging in deception. If the lawyer determines that the client intends to proceed or has proceeded with the contemplated deceptive conduct, the lawyer may research and advise the client of the potential risks and consequences of such deceptive conduct under the substantive law governing the client's contemplated False Claims Act case.

Rules: 1.0(i), 1.1, 1.2(d), 1.3, 8.4(a) & (c)

FACTS:

1. The inquirer's client is a prospective relator in a False Claims Act case. The False Claims Act, codified at 31 U.S.C. §§ 3729-3733, permits a private individual (called a "relator") to sue any person or entity that fraudulently obtains funds from or fraudulently avoids paying money to the federal government. The relator brings a lawsuit on behalf of the federal government, typically via a sealed complaint, and notifies the federal government of the lawsuit. After the federal government investigates the alleged fraud, the government generally may either (a) intervene and take over the case or (b) decline to intervene and allow the relator to continue to pursue the claim. If the suit is successful (whether prosecuted by the government or the relator), the federal government may recover up to three times the amount of the fraud, plus penalties, and the relator may obtain a share of the recovery of up to 30%, plus legal fees and expenses.

2. The inquirer's client has information that certain companies have obtained federal funds through fraud, but that client is seeking additional information to support the filing of a False Claims Act complaint. The client is contemplating reaching out to representatives, employees, and/or owners of the companies, using a ruse to obtain such information. Specifically, the client would tell each one that he is seeking their company's services and that he (the inquirer's client) may be eligible for some type of grant funding to pay for such services. Neither statement would be true.

QUESTION:

3. May the inquirer advise a client on using deception to obtain evidence to support the filing of a False Claims Act complaint?

OPINION:

4. This opinion does not address the use of otherwise lawful investigative techniques by government law enforcement personnel.

5. In the New York Rules of Professional Conduct, Rule 8.4(c) broadly prohibits a lawyer from engaging in deceptive conduct. (We assume that the inquirer's client is not a lawyer and so we address herein only how Rule 8.4(c) would apply to the conduct of the inquirer, who is a lawyer.) Rule 8.4(c) provides that:

> A lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

6. In addition, Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct "through the acts of another."

7. A relevant rule here is Rule 1.2(d), which provides that:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that *the lawyer may discuss the legal consequences of any proposed course of conduct with a client.* [Emphasis added.]

8. Reading Rule 1.2(d) and Rule 8.4(c) together, a lawyer does not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" when the lawyer advises a client on the "legal consequences" of deceptive conduct that the client contemplates, but the lawyer cannot encourage or assist the client in engaging in the deceptive conduct.

9. The inquiry raises the question of whether there may be implicit exceptions to the prohibition on a lawyer encouraging or assisting the client in engaging in deceptive investigative techniques that would be available in the circumstances presented.

10. We conclude that no authority in the Rules (or interpreting the Rules) currently provides an exception to the prohibitions in Rule 8.4(c) that forbid a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation when the lawyer investigates possible False Claims Act violations. Likewise, we know of no authority in the Rules that provides an exception to the prohibitions in Rule 1.2(d) that forbid a lawyer to "assist" a client in "conduct that the lawyer knows is illegal or fraudulent" when the lawyer (or the lawyer's client) investigates possible False Claims Act violations.

11. Of the four types of conduct referenced in Rule 8.4(c), only "fraud" is defined in the New York Rules; that definition reaches both illegal conduct as well as conduct that, while legal, otherwise is intended to deceive. Rule 1.0(i) states:

> "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

12. "Dishonesty" and "deceit" as used in Rule 8.4(c) are generally understood to bear their normal meanings, while "misrepresentation" is defined in Black's Law Dictionary (9th ed. 2009) to refer to "[t]he act of making a false or misleading assertion about something, [usually] with the intent to deceive," whether through written or spoken words or conduct, thus overlapping somewhat with the other three types of conduct proscribed in Rule 8.4(c). *See* Roy Simon, Simon's New York Rules of Professional Conduct Annotated § 8.4:15 (2024 ed.). Taken together and

given their literal meanings, Rule 8.4(c)'s four types of proscribed conduct thus reach a broad swath of activities.

13. This Committee has recognized the breadth of Rule 8.4(c)'s prohibition in other contexts. For example, we have opined that the prohibition broadly extends to a lawyer's conduct even when the activity at issue does not constitute the practice of law. *See* N.Y. State 1097 (2015) (lawyer making phone calls as a debt collector, not as a lawyer, to collect commercial debts, does not have to disclose his or her status as a lawyer, but must be truthful and not misleading if a debtor asks whether the caller is a lawyer and the lawyer decides to answer the question); N.Y. State 1081 (2015) (lawyer employed by debt management company under the direction of a nonlawyer managing director is subject to rules that apply to a lawyer even where the lawyer does not have any attorney-client relationship, such as Rule 8.4(c)'s prohibition against conduct involving dishonesty).

14. We recognize that there has been substantial debate among New York bar associations and legal-ethics commentators about whether and to what extent some types of deception may be excepted from the prohibition set forth in Rule 8.4(c), particularly in the investigative context. *See*, e.g., Simon's NY Rules § 8.4:20.

15. We also recognize that, because language substantially similar to New York Rule 8.4(c) appears in Rule 8.4(c) of the American Bar Association's Model Rules of Professional Conduct and in the analogous rule in various other state rules of professional conduct, the debate has been joined in numerous other jurisdictions as well. Some states (but not New York) have included specific language in their versions of Rule 8.4(c) expressly permitting certain uses of deception or permitting, to some extent, advice about and supervision of deceptive conduct. *See*, e.g., Colo. R. Prof. Conduct 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities[.]"); Ore. R. Prof. Conduct 8.4(a)(3), (b) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law[.] . . . Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct").[1]

16. Federal and state courts in New York also have addressed the use of deceptive investigative practices by nonlawyers under the supervision of non-governmental lawyers, although not in the False Claims Act context contemplated by this inquiry.

17. For example, *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D.N.Y. 1999), concerned plaintiff's counsel's use of undercover nonlawyer investigators pretending to be customers to determine whether a furniture store was infringing on plaintiff's trademark. *Gidatex* was decided under the old New York Code of Professional Responsibility, where the predecessor to Rule 8.4(c) – DR 1-102(A)(4) – provided: "A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." That is the same language used in Rule 8.4(c). The district court opined, in relevant part, that this proscription should not apply "where a party is legitimately investigating potential unfair business practices by use of an undercover

[1] *See generally* Barry Temkin, *Deception in Undercover Investigations: Conduct-Based v. Status-Based Ethical Analysis*, 32 Seattle Univ. L. Rev. 123 (2008).

investigator posing as a member of the general public engaging in ordinary business transactions with the target." *Gidatex*, 82 F. Supp. 2d at 122. And even if the rule applied, the district court added, the investigators' conduct did not violate the rule because it "simply d[id] not represent the type of conduct prohibited by the rules." *Id*. at 126.

18. Similarly, in *Mena v. Key Food Stores Co-op., Inc.*, 758 N.Y.S.2d 246, 250 (Kings Cty. Sup. Ct. 2003), the trial court determined that an attorney who assisted an employment discrimination client in secretly recording defendants' racist and sexist statements "should not be subject to condemnation under the disciplinary rules," including DR 1-102(A)(4). The *Mena* court reasoned that "undercover agents in criminal cases and discrimination testers in civil cases routinely use clandestine investigatory techniques which are not condemned on ethical grounds by courts, ethics committees or grievance committees because these techniques address policy objectives in that they make it possible to detect and prove activity which may otherwise escape discovery or proof." *Id*. (citing *Gidatex*, 82 F. Supp. 2d at 123).

19. Both *Gidatex* and *Mena* arose in the context of evidentiary challenges, which the courts rejected. *See Gidatex*, 82 F. Supp. 2d at 126 (denying "motion in limine to preclude *Gidatex* from offering testimony, reports, and recorded conversation of its investigators"); *Mena*, 758 N.Y.S.2d at 247, 250 (denying motion to "suppress the contents of the taped conversations and disqualify counsel from any further representation of the plaintiffs"). Arguably, then, the courts' pronouncements regarding DR 1-102(A)(4) in these cases are dicta because the courts were ruling on the admissibility of evidence rather than on whether lawyers should be disciplined. In any event, neither case addresses the specific scenario presented here, where a private lawyer seeks ethical permission to assist a client in investigating a potential False Claims Act case. Thus, neither *Gidatex* nor *Mena* provides direct ethical guidance here.

20. Two New York bar associations have previously examined Rule 8.4(c) in the context of deceptive investigative techniques. The New York County Lawyers Association ("NYCLA") interpreted an existing rule and the New York City Bar Association proposed an amendment to Rule 8.4(c).

New York County Lawyers' Association

21. N.Y. County 737 (2007), like *Gidatex* and *Mena*, interpreted the prohibition set forth in DR 1-102(A)(4). N.Y. County 737 concluded that a lawyer may knowingly utilize and/or supervise "dissemblance in an investigation" in "a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence." Opinion 737 carefully distinguishes "dissemblance" (which is permissible) from "dishonesty, fraud, deceit, or misrepresentation" (which is prohibited) by considering the degree and purpose of the conduct:

> [D]issemblance . . . is commonly associated with discrimination and trademark/ copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful.

22. Opinion 737 noted that, although there was no nationwide judicial consensus on dissemblance, a number of evidentiary rulings had approved a lawyer's use of dissemblance (or assistance to another in carrying out dissemblance). Those courts had reasoned that considering such judicially approved conduct to be ethically permissible would be "most consistent with the

overall purposes of the Disciplinary Rules and conforms to professional norms and societal expectations." *Id*. Accordingly, Opinion 737 concluded with a four-part test:

> Non-government lawyers may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances 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 immediately 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 lawyer's 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. Moreover, the investigator must be instructed not to elicit information protected by the attorney-client privilege.

<u>*New York City Bar Association*</u>

23. In 2011, more than two years after the New York Courts replaced the old Code of Professional Responsibility with the New York Rules of Professional Conduct, three committees of the Association of the Bar of the City of New York (the Professional Responsibility Committee, the Professional Ethics Committee, and the Professional Discipline Committee) issued a report (the "N.Y. City Report") proposing an amendment to Rule 8.4 that would expressly address lawyers' use of or involvement in deceptive practices in undercover investigations. The N.Y. City Report took the view that deception was prohibited by the Rules and that ethics opinions, "even those as soundly based in policy as is [N.Y. County] 737," could not "operate as vehicles for legislating changes to the rules of legal ethics." N.Y. City Report at 1. With the aim of permitting lawyers "to give advice regarding, and to supervise the conduct of, otherwise lawful undercover investigations," the N.Y. City Report proposed amending Rule 8.4(a) to add the phrase italicized below:

> [A lawyer or law firm shall not] 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*[.]

Id. at 10.

24. The approaches taken in N.Y. County 737 and the N.Y. City Report differ in two general respects relevant to the issue presented here. First, the view taken in N.Y. County 737 on the permissible scope of deception is narrower than the view expressed in the N.Y. City Report. Opinion 737 is narrower in that it is limited to dissemblance in civil rights or intellectual property rights investigations or in other matters expressly authorized by law, whereas the N.Y. City Report's proposal would permit a lawyer to induce, assist or supervise another person in the use of deception as long as the undercover investigation is lawful (i.e., not prohibited) and does not violate Rule 4.2's prohibition against a lawyer's *ex parte* communications with persons the lawyer knows to be represented by counsel in the matter. Second, N.Y. County 737 recognizes limited current exceptions notwithstanding a "plain reading" of DR 1-102(A)(4) (now Rule 8.4(c)), whereas the N.Y. City Report takes the view that actual amendment of the text of Rule 8.4 is necessary to give rise to any such exceptions.

25. Despite these differences, the conduct at issue here—i.e., a private lawyer's inducing, assisting or supervising a nonlawyer client to use deception in the specific context of a covert investigation into potential violations of the False Claims Act—would not be permitted either under N.Y. County 737's recognition of an implicit exception to Rule 8.4(c) in limited circumstances or under the N.Y. City Report absent an amendment to Rule 8.4. Nor, as noted, are we aware of any case law in a New York court that has opined on the permissibility of such conduct—and some out-of-state courts have strongly condemned such conduct. *See Leysock v. Forest Labs., Inc.,* No. 12-11354-FDS, 2017 WL 1591833 (D. Mass. Apr. 28, 2017) (dismissing False Claims Act case due to plaintiff's counsel's deceptive investigative practices, which caused doctors to disclose protected medical information).

26. To the extent that the lawyer determines that the client intends to proceed or has proceeded with the contemplated deceptive conduct, we think that the lawyer should research and inform the client of the potential risks and consequences of such conduct under the substantive law (on which we do not opine). Specifically, the inquirer should inform the client of any potential adverse consequences; doing so would be consistent with the lawyer's duties of competence and diligence under Rules 1.1(a) and 1.3 and the limitation on the lawyer's advice in such circumstances contemplated in Rule 1.2(d). Such advice would not be prohibited by Rule 8.4(c).

CONCLUSION:

27. Currently, no authority under the New York Rules would permit the inquirer to induce, assist or supervise a client in engaging in deception in the manner contemplated here. If the lawyer determines that the client intends to proceed or has already proceeded with the contemplated deceptive conduct, the lawyer may research and advise the client of the potential risks and consequences of such conduct under the substantive law governing the client's contemplated False Claims Act case.

(03-26)