

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

**PROFESSIONAL RESPONSIBILITY COMMITTEE  
PROFESSIONAL ETHICS COMMITTEE  
PROFESSIONAL DISCIPLINE COMMITTEE**

**PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 8.4  
REGULATING LAWYERS' SUPERVISION OF UNDERCOVER INVESTIGATIONS**

**I. INTRODUCTION**

This Report, and proposed amendment to the Rules of Professional Conduct, addresses a serious professional responsibility dilemma repeatedly faced by lawyers confronted with situations requiring the use of “undercover investigations”: whether deceptive tactics may be employed by the lawyers themselves, by investigators, by so-called “testers,” or by others acting under the lawyers’ direction, and if so, under what circumstances?

On May 23, 2007, The Committee on Professional Ethics of the New York County Lawyers’ Association (the “NYCLA Committee”) issued Formal Opinion 737 in an attempt to provide guidance to New York lawyers on this fraught topic.<sup>1</sup> While Opinion 737 seeks to establish a limited safe harbor for a lawyer’s employment of certain deceptive practices, that safe harbor is not supported by the applicable provisions of the New York Rules of Professional Conduct, effective April 1, 2009 (the “NY Rules”), or the now obsolete New York Code of Professional Responsibility (the “Code”). Because ethics opinions – even those as soundly based in policy as is Opinion 737 – cannot operate as vehicles for legislating changes to the rules of legal ethics, the three Committees that comprise the legal ethics cluster of the City Bar jointly propose herein the adoption of an amendment to the Rules of Professional Conduct that would provide the Bar with guidance for what conduct is, and is not, ethically permitted.

In short, for the reasons set forth below, we propose amending Rule 8.4(a) – which otherwise provides that a lawyer shall not violate the Rules of Professional Conduct directly or “through the acts of another” – so that the Rule expressly permits a lawyer to give advice regarding, and to supervise the conduct of, otherwise lawful undercover investigations.

**II. NATURE AND SCOPE OF THE PROBLEM**

NY Rule 8.4(c)<sup>2</sup> provides that a lawyer or law firm shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation,” and NY Rule 4.1<sup>3</sup> provides that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or

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<sup>1</sup> Since the issuance of Opinion 737, Barry R. Temkin, Chair of the NYCLA Committee, has written *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 Seattle U. L. Rev. 123 (2008) which calls for development of an ethical rule addressing the issues raised in Opinion 737. Mr. Temkin does not, however, propose the text of such a rule, a task that this Report seeks to accomplish.

<sup>2</sup> See also former Disciplinary Rule (“DR”) 1-102(A)(4) of the New York Lawyer’s Code of Prof’l Responsibility.

<sup>3</sup> See also former DR 7-102(A)(5).

law to a third person.” In addition, NY Rule 8.4(a)<sup>4</sup> provides that a lawyer or 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.” *See also* NY Rule 5.3(b)(1)<sup>5</sup> (providing that a lawyer “shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer if . . . the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it”).

Notwithstanding these Rules, and their similar predecessors, some New York lawyers across a wide spectrum of disciplines routinely employ officers, agents, inspectors, investigators and testers who engage in what can fairly be called “deceptive” conduct in order to: (i) protect or assert their clients’ rights; (ii) pursue good faith claims that a violation of law has taken place; or (iii) establish a defense to claims that a violation of law has taken place. On the other hand, it appears that many lawyers shy away from the use of such methods for the fear that they may run afoul of the above-described Rules of Professional Conduct.

New York is by no means the only State confronted with this issue. Various jurisdictions – among them, Colorado, Oregon, Virginia, Illinois, Utah, and the District of Columbia – have identified this problem and have attempted to address it in a variety of ways.

Colorado, for example, has tackled the issue by imposing an outright prohibition on the use of deceptive tactics by lawyers. In *People v. Pautler*,<sup>6</sup> the Colorado Supreme Court upheld disciplinary sanctions for a state prosecutor who posed as a public defender in order to induce the surrender of a suspect who had confessed to killing three women and raping another. The suspect had told police that he was armed and had made vague threats about killing other people, but refused to surrender before speaking to a public defender.<sup>7</sup> While Pautler contended that, notwithstanding Colorado’s similar Rule 8.4(c), his conduct was justified because he genuinely feared that the suspect might harm others,<sup>8</sup> the Disciplinary Court and the state’s Supreme Court disagreed, holding that “[t]his sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished.”<sup>9</sup> Pautler was suspended for three months, stayed during twelve months of probation, during which time he was required to take ethics courses and retake the professional responsibility examination.<sup>10</sup>

Although the *Pautler* case concerned a lawyer who personally engaged in deceptive conduct (and also grossly interfered with the attorney-client relationship), we understand the language of *Pautler*, as it construed the attorney-ethics rules in Colorado, to impose a blanket prohibition on both the direct and supervisory role of attorneys in the commission of deception under any circumstance. Thus, Colorado appears to have no exception authorizing, for example, a lawyer’s supervision of deceptive conduct by an undercover officer communicating with a

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<sup>4</sup> *See also* former DR 1-102(A)(1) and (2).

<sup>5</sup> *See also* former DR 1-104(D); DR 1-102(A)(2).

<sup>6</sup> 35 P.3d 571 (Colo.O.P.D.J. 2001), *aff’d* 47 P.3d 1175 (Colo. 2002).

<sup>7</sup> *See Pautler*, 35 P.3d at 576-77.

<sup>8</sup> *Pautler*, 35 P.3d at 578.

<sup>9</sup> *In re Pautler*, 47 P.3d 1175, 1184 (Colo. 2002).

<sup>10</sup> *Pautler*, 35 P.3d at 589.

criminal suspect or a lawyer's supervision of a tester pretending to be interested in purchasing counterfeit merchandise.

### III. PRECEDENT FROM OTHER JURISDICTIONS

#### A. Express Authorization for Undercover Investigations

Several jurisdictions have addressed the issue by rewriting their legal ethics rules to permit lawyers to engage in conduct involving the use of undercover investigations in certain limited circumstances.

For example, Rule 8.4(a)(3) of the Oregon Rules of Professional Conduct (the "Oregon Rules") – the functional equivalent of NY Rule 8.4(c) – bans only deception "that reflects adversely on the lawyer's fitness to practice law."<sup>11</sup> Oregon Rule 8.4(b) further clarifies that "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 ..." The Rule also defines "covert activity" as "an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge," and makes clear that such covert activity may only be commenced or supervised by the lawyer when he or she "in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future."<sup>12</sup> Thus, Oregon permits the use of indirect deception in undercover investigations by *all* lawyers, regardless of the status of the lawyer or the substantive nature of the claim (*i.e.*, by its terms, the Rule is not limited to criminal, civil rights or intellectual property cases).

Virginia and Florida likewise have adopted rules permitting some deceptive conduct. Rule 8.4(c) of the Virginia Rules of Professional Conduct provides that "it is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation *which reflects adversely on the lawyer's fitness to practice law.*" (Emphasis added.) Rule 4-8.4(c) of the Florida Rules of Professional Conduct is considerably narrower, providing that "it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation ... [or] to participate in an undercover investigation, unless prohibited by law or rule."

Although not a formal Rule change, Iowa has adopted the substance of Oregon Rule 8.4(b) in a comment to Rule 32:8.4(c) of the Iowa Rules of Professional Conduct, permitting both criminal and civil lawyers to supervise or participate in lawful covert activity in certain circumstances, regardless of the nature of the claim.

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<sup>11</sup> Oregon Rule 8.4(a)(3).

<sup>12</sup> Oregon Rule 8.4(b).

B. Accepting Deception by Pretending the Problem Doesn't Exist

Other jurisdictions, including the District of Columbia, Utah, New Jersey, and Illinois have taken a different approach, whereby the respective ethics committees have deemed conduct that is arguably false, deceptive and misleading – and flatly violative of those jurisdictions' respective versions of Rule 8.4 – to nonetheless be permissible by virtue of the worthiness of the objectives sought to be gained by the conduct.

In the District of Columbia, for example, the D.C. Bar concluded that Rule 8.4(c) of the District of Columbia Rules of Professional Conduct did not prohibit attorneys employed by national intelligence agencies from misrepresenting themselves while acting in furtherance of their official duties because, according to the D.C. Bar, the “conduct proscribed by the Rule does not include misrepresentations made in the course of official conduct as an employee of an agency of the United States if the attorney reasonably believes that the conduct in question is authorized by law.”<sup>13</sup> This approach has been criticized as intellectually dishonest in that it effectively holds that lies told by national security agents are not really lies.<sup>14</sup>

The Utah Bar has taken a similar approach. Rather than revise its ethics rules, in Formal Op. 02-05, the Utah Bar opined that, although “[o]n its face, Rule 8.4(c) would seem to make it professional misconduct for a lawyer to engage in any kind of misrepresentation,” it “was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations.”<sup>15</sup>

In *Apple Corps. Ltd. v. Int'l Collectors Society*,<sup>16</sup> the District Court of New Jersey similarly ignored the plain language of Rule 8.4(c) and held that the Rule “does not apply to misrepresentations solely as to identity of purpose and solely for evidence gathering purposes.”<sup>17</sup> The court noted that this kind of activity is common in criminal and discrimination cases; that it has not been condemned on ethical grounds by courts, ethics committees, or grievance committees; and that “[t]he prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”<sup>18</sup>

An equally unsatisfactory approach has been adopted in Illinois, where the Illinois Supreme Court was unable to decide on an appropriate sanction for a prosecutor who had violated Rule 8.4(c) of the Illinois Rules of Professional Conduct. Although no rules changed, as one commentator explained, Illinois disciplinary authorities “have ever since operated under an

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<sup>13</sup> D.C. Bar Legal Ethics Comm., Formal Op. 323 (2004).

<sup>14</sup> See Eric Morrow, *When is a Lie Not a Lie? When is Told by the State: Lawlessness in the Name of the Law*, 19 Geo. J. Legal Ethics 871, 875-76 (2006).

<sup>15</sup> Utah State Bar Ethics Advisory Opinion Committee, Op. No. 02-05 (Mar. 18, 2002).

<sup>16</sup> 15 F.Supp.2d 456 (D.N.J. 1998).

<sup>17</sup> *Id.* at 475.

<sup>18</sup> *Id.*

informal understanding that prosecutors can use deception in conducting otherwise lawful investigations.”<sup>19</sup>

In our view, the approaches taken in the District of Columbia, Utah, New Jersey, and Illinois are sub-optimal simply because, while they recognize the need for and the propriety of lawyer-supervised undercover investigations, they ignore the fact that the Rules in such jurisdictions do not expressly condone such attorney conduct. Thus, these jurisdictions in effect ignore the problem without providing an ideal long-term solution.

#### IV. THE CURRENT LAW IN NEW YORK

By virtue of case law and Opinion 737, New York has been drawn into the latter group of jurisdictions that have tacitly condoned covert activity in certain circumstances, even where the Rules do not provide express authorization for such attorney conduct.

The leading case on the use of undercover investigations by attorneys as a discovery tool in New York is the opinion of United States District Judge Shira A. Scheindlin, of the Southern District of New York, in *Gidatex, S.r.L., v. Campaniello Imports, Ltd.*<sup>20</sup> There, the plaintiff, a furniture manufacturer, sued its terminated distributor for trademark infringement. In order to prove that the defendants had engaged in “bait and switch” tactics by luring customers into its showrooms and warehouse with advertisements bearing the plaintiff’s trademark and then selling those customers furniture produced by other manufacturers, plaintiff’s counsel hired two private investigators to pose as interior designers, visiting defendants’ showrooms and warehouse, and to secretly tape-record conversations with defendants’ salespeople.<sup>21</sup> Defendants moved for an order *in limine* precluding plaintiff from offering the testimony and reports of its investigators and the secretly-obtained tape recordings of defendants’ employees. Defendants argued that plaintiff’s counsel had violated the Code by causing the investigators to communicate with a party known to be represented by counsel and, through the use of the investigators, engaging in conduct involving misrepresentation contrary to DR 1-102 (now NY Rule 8.4).<sup>22</sup>

Judge Scheindlin held:

The[] ethical rules should not govern situations where a party is legitimately investigating potential unfair business practices by use of an undercover posing as a member of the general public engaging in ordinary business transactions with the target. To prevent this use of investigators might permit targets to freely engage in unfair business practices which are harmful to both trademark owners and consumers in general. Furthermore, excluding evidence obtained by such investigators would not

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<sup>19</sup> Thomas H. Moore, Current Development, *Can Prosecutors Lie?*, 17 *Geo. J. Legal Ethics* 961, 973 (2004) (quoting Utah Ethics Advisory Op. 02-05 (2002), available at [http://www.utahbar.org/rules\\_ops\\_pols/ethics\\_opinions/op\\_02\\_05.html](http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_05.html)).

<sup>20</sup> 82 F.Supp.2d 119 (S.D.N.Y. 1999).

<sup>21</sup> *Id.* at 120.

<sup>22</sup> *Id.* at 119-20.

promote the purpose of the rule, namely preservation of the attorney/client privilege.<sup>23</sup>

Citing both Second Circuit and New York State precedents, Judge Scheindlin ultimately declined to exclude the evidence offered by plaintiff, explaining that “a court is not obligated to exclude evidence *even* if it finds that counsel obtained the evidence by violating ethical rules.”<sup>24</sup>

*Gidatex* has been cited frequently in New York to justify the engagement of investigators and testers by lawyers when there is a legitimate public policy argument in favor of unearthing unlawful conduct that may not be susceptible of proof in any other way. However, although *Gidatex* judicially sanctioned covert activity in some circumstances, the ethical propriety of the lawyer’s role in undercover investigations was not decided in the opinion, which focused upon the admissibility of evidence obtained through allegedly unethical means.

To address the question left unanswered by *Gidatex*, in 2007 the NYCLA Committee weighed in with Opinion 737, opining that attorneys were permitted to supervise undercover investigations in a narrow set of circumstances:

Non-government attorneys may ... 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 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 lawyer’s conduct and the investigators’ conduct that the lawyer is supervising do not otherwise violate the Code ... or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties.<sup>25</sup>

The careful analyses set forth in both *Gidatex* and Opinion 737 attempt to reconcile the strong anti-fraud language in the New York Rules with the practical reality that otherwise-lawful deception is sometimes needed to obtain valuable evidence. That these precedents are not wholly successful is not the fault of their drafters, but rather a function of the gaps in the Rules themselves. Simply put, notwithstanding these precedents, there is no Rule in New York that expressly authorizes a lawyer’s supervision of agents who engage in deceptive conduct, regardless of motive.

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<sup>23</sup> *Id.* at 122.

<sup>24</sup> *Id.* (emphasis in original). See also *U.S. v. Parker*, 165 F.Supp.2d 431, 477 (W.D.N.Y. 2001) (even if attorney misconduct is deemed an ethical violation, “such does not warrant use of the exclusionary rule as a remedy for such violation”); *Stagg v. New York City Health & Hosp. Corp.*, 162 A.D.2d 595, 596, 556 N.Y.S.2d 779 (2d Dep’t 1990) (evidence is admissible even if procured by unethical or unlawful means). Cf. *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (district court has discretion to order suppression of evidence obtained in violation of ethics rules).

<sup>25</sup> NYCLA Committee on Prof’l Ethics, Formal Op. No. 737 (May 23, 2007).

## V. PROPOSAL

### A. The Proposed Rule Amendment and Comment

We believe that, with respect to a lawyer's rendering of advice to, and supervision of, investigators and agents who engage in undercover investigations, New York should employ the approach taken by Oregon, with a rule change that directly addresses the question of what conduct will, and will not, be permitted by way of exception to Rule 8.4(a)'s mandate that a lawyer shall not violate the Rules of Professional Conduct directly or "through the acts of another." We accordingly propose the amendment of NY Rule 8.4(a) (the "Proposed Amendment"), as set forth in *italics* below:

#### RULE 8.4: MISCONDUCT

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;*

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Unlike Opinion 737, the language of the above Proposed Amendment does *not* refer to any one particular area of substantive law, such as civil rights or intellectual property law. Rather, its mandate is universally applicable to lawyer conduct in all substantive disciplines.

As for a lawyer's *personally* engaging in the commission of deceptive conduct (as distinguished from the lawyer's supervision of, or giving advice regarding, the deceptive conduct of clients or agents), we are resigned to leave for another day the task of crafting a rule that identifies what conduct may and may not be permissible. Thus, the Proposed Amendment does not address in any fashion a lawyer's personally engaging in deceptive conduct.

Finally, it should also be noted that the Proposed Amendment does not provide a safe harbor for conduct that would otherwise violate Rule 4.2: Communication with Person Represented by Counsel. Thus, the uses of undercover investigations that would be authorized by the Proposed Amendment would not extend to conduct that would otherwise violate Rule 4.2. Nor is the Proposed Amendment intended to restrict in any way undercover communications with represented parties otherwise permissible under Rule 4.2 as part of a law enforcement investigation.

The foregoing considerations are set forth in the proposed Comment [6A], which would accompany the Proposed Amendment:

## 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.*

### B. Policy Justifications

Although both the Supreme Court<sup>26</sup> and the Second Circuit<sup>27</sup> have sanctioned the use of investigators in criminal cases, and both the Southern District of New York and the NYCLA Committee have sanctioned a lawyer's supervision of undercover investigations in intellectual property and civil rights cases,<sup>28</sup> the fact is that such attorney behavior is flatly proscribed by the plain language of the NY Rules. There are those who may contend that the Proposed Amendment runs counter to NY Rules 4.1, 8.4, and 5.3 and *sub silentio* repeals those provisions. Yet this argument does not address the uniform view that in criminal, civil rights, and intellectual property cases, attorney supervision of undercover investigations is permissible and does not run afoul of the Rules. The Proposed Amendment resolves the tension between the widespread acceptance of the use of undercover investigations in these circumstances and the plain language of the existing NY Rules.

The narrowly-prescribed authority to render advice and supervision with respect to the conduct of undercover investigations, as set forth in the Proposed Amendment, will serve important policy interests in cases outside of the criminal, civil rights, and intellectual property contexts. For example, the Proposed Amendment will allow attorneys in civil cases to investigate or defend against claims of unfair business and trade practices, antitrust violations, fraudulent conduct, or corporate espionage. Thus, the Committee believes that the focus should be on the conduct of the attorney, rather than on the substantive nature of the claim.<sup>29</sup>

It has also been argued that the Proposed Amendment would run counter to Section 487 of New York's Judiciary Law, a statute which defines a misdemeanor and creates a private cause

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<sup>26</sup> See *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (“[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises”).

<sup>27</sup> *U.S. v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (“under the [no contact rule], a prosecutor is ‘authorized by law’ to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization”).

<sup>28</sup> *Gidatex*, *supra* note 25, at 122.

<sup>29</sup> See Temkin, note 1 *supra*, at 137-66.



of action, with treble damages, against any attorney who, *inter alia*, “[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.” It may be that some conduct covered by the Proposed Amendment – much like the conduct already condoned in *Gidatex* and other case law – would violate Section 487 under certain circumstances.<sup>30</sup> If so, a change to Judiciary Law Section 487 may be required.

The Proposed Amendment clearly limits the scope of permissible deceptive conduct and provides that an attorney’s conduct must be evaluated in light of all of the Rules of Professional Conduct. We believe that the most egregious cases of deception would be prohibited by the no-contact rule and other rules governing attorney behavior. Thus, the Committee does not intend to circumvent the holding in *In re Malone*<sup>31</sup> where a lawyer was disciplined for instructing a witness to lie under oath.

Finally, as with any other situation, an attorney must always exercise personal judgment when acting on behalf of a client. Thus, we do not believe that enacting the Proposed Amendment poses a legitimate risk of opening the door for attorneys to, for example, initiate romantic relationships with non-represented parties or witnesses for the sake of gathering evidence.

In sum, we believe that the addition of Proposed Amendment is necessary in light of the lack of synchronicity between the plain language of the aforementioned 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. We further believe that the attorney conduct that would be authorized by the Proposed Amendment furthers the State’s interest in identifying and curbing unlawful activity, whether criminal or civil, and regardless of the nature of the claim. We thus respectfully submit that the addition of the Proposed Amendment is necessary and appropriate.

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<sup>30</sup> Much case law suggests that the undercover investigations contemplated by the Proposed Amendment would not violate Section 487, because New York courts have consistently limited “the application of § 487 to claims that the defendant attorney has intentionally ‘engaged in a chronic, extreme pattern of legal delinquency.’” See *O’Callaghan v. Sifre*, 537 F.Supp.2d 594, 596 (S.D.N.Y. 2008), citing *Schindler v. Issler & Schrage, P.C.*, 262 A.D.2d 226, 692 N.Y.S.2d 361, 363 (1st Dep’t 1999). See also *Kaminsky v. Herrick, Feinstein LLP*, 59 A.D.3d 1, 13, 870 N.Y.S.2d 1, 8 (1st Dep’t 2008) (dismissing 487 claim alleging deceitful conduct because plaintiff did not allege “a chronic and extreme pattern of legal delinquency”); *Solow Management Corp. v. Seltzer*, 18 A.D.3d 399, 400, 795 N.Y.S.2d 448 (1st Dep’t 2005) (dismissing claim because “one arguable misrepresentation” is not sufficient to state a cause of action under Jud. Law § 487). Moreover, conduct occurring either before a “case” is commenced or in situations where a case is never commenced, likely the conduct utilized in many undercover investigations, may fall outside the reach of the statute. See *Mahler v. Campagna*, 60 A.D.3d 1009, 1012-13, 876 N.Y.S.2d 143 (2d Dep’t 2009) (dismissing cause of action alleging violation of Jud. Law § 487 because, “the statute applies only to wrongful conduct by an attorney in an action that is actually pending”). However, in *Amalfitano v. Rosenberg*, 533 F.3d 117, 123-24 (2d Cir. 2008), the Second Circuit noted that the requirement that the plaintiff show “a chronic and extreme pattern” of legal delinquency “appears nowhere in the text of the statute,” and that “other courts have found attorneys liable under the statute for a single intentionally deceitful or collusive act.” *Id.* Yet in support of this proposition, *Amalfitano* cited to only one case in which the court held that a single incident was sufficient “where lying under oath is alleged.” *NYAT Operating Corp. v. Jackson, Lewis, Schnitzler & Krupman*, 191 Misc.2d 80, 741 N.Y.S.2d 385 (N.Y. Sup. 2002). In *Amalfitano*, moreover, the district court found that the defendant’s conduct did, in fact, constitute a “chronic, extreme pattern of legal delinquency.” 533 F.3d at 124.

<sup>31</sup> 105 A.D.2d 455, 480 N.Y.S.2d 603 (3d Dep’t 1984).

## VI. FULL TEXT OF PROPOSED AMENDMENT AND COMMENT

The Proposed Amendment and Comment are in *italics* below.

### **RULE 8.4: MISCONDUCT**

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;*

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

## **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.*

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