

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 737
Date Issued: 5/23/07

TOPIC: Non-government lawyer use of investigator who employs dissemblance

DIGEST: In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible 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. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (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 and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.

CODE: DR 1-102(a)(2)(3)(4), DR 1-104(d), DR 5-102, DR 7-102(a)(5), DR 7-104

QUESTION: Under 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?

OPINION:

The word “dissemble” is defined as follows: “To give a false impression about (something); to cover up (something) by deception (to dissemble the facts).” Black’s Law Dictionary (8th ed. 2004).

DR 1-102(a)(3) provides: “A lawyer or law firm shall not . . . engage in *illegal* conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer.” (emphasis added). DR 1-102(a)(4) of the Code provides: “A lawyer or law firm shall not engage in conduct involving *dishonesty, fraud, deceit, or misrepresentation.*” (emphasis added). DR 7-102(a)(5) provides, “In the representation of a client, a lawyer shall not knowingly make a false statement of law or fact.” DR 1-104(d) provides, in relevant part, that a lawyer shall be responsible for a violation of the disciplinary rules by another lawyer or non-lawyer through involvement, knowledge or supervisory authority if the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it.

DR 1-102(a)(2) of the Code provides, “A lawyer or law firm shall not . . . circumvent a Disciplinary Rule through *actions of another.*” (emphasis added).

Accordingly, when a lawyer is faced with the option of hiring an investigator who intends to employ dissemblance in order to gather certain evidence¹, the lawyer must consider whether the Code of Professional Responsibility permits the lawyer to proceed.

A plain reading of DR 1-102(a)(4) (the “Honesty Rule”), DR 7-102(a)(5) (the “False Statement Rule”), together with DR 1-102(a)(2) and DR 1-104(d), (“the Integrity Rules”), on their face leave little doubt that “dissemblance” is ethically impermissible in New York if dissemblance is deemed equivalent to “dishonesty, fraud, deceit, or misrepresentation.” Moreover, the legality, vel non, of the specific conduct also has a bearing on whether the conduct is covered within the meaning of DR 1-102(a)(3).

Importantly, dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance. For purposes of this opinion, dissemblance refers to misstatements as to identity and purpose made solely for gathering evidence. It 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. Dissemblance ends where

¹ This opinion only addresses the situation in which the investigator acts as the lawyer’s agent as opposed to the client’s agent. See, e.g., *Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693, 695-6 (8th Cir. 2003) (lawyers had “retained” the investigator and directed the investigator’s conduct). The question of agency will likely depend on the facts and circumstances. See, e.g., *Allen v Int’l Truck & Engine*, 2006 U.S. Dist. LEXIS 63720 at *22-25 (S.D. Ind. 2006) (analysis of counsel’s level of involvement in investigation).

misrepresentations or uncorrected false impressions rise to the level of fraud or perjury², communications with represented and unrepresented persons in violation of the Code, *see* DR 7-104, or in evidence-gathering conduct that unlawfully violates the rights of third parties. *See also* David B. Isbell & Lucantonio Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under The Model Rules of Professional Conduct, 8 Geo. J. Legal Ethics 791, 817 (Summer 1995) (“[ABA Model] Rule 8.4(c) applies to conduct by a lawyer in a private capacity that is so grave as to call into question the lawyer’s fitness to practice law . . .”).

This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. Such investigations, which are discussed approvingly in *United States of America v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001), are outside the scope of this opinion. This opinion also does not address whether a lawyer is ever permitted to himself or herself make dissembling statements directly.

Survey of Authorities

We are aware of only three jurisdictions that have adopted explicit rule-based exceptions for the use of dissemblance in an investigation; two of which are limited to government lawyers: Oregon,³ Alabama⁴ and Florida⁵. There is no explicit rule-based exception permitting the use of dissemblance in New York. Accordingly, any ethically permissible use of dissemblance must rely on existing case law and ultimately on a principles-based determination.

Nor can we look to the ABA for firm guidance. In its opinion on surreptitious recording, the ABA left “for another day the separate question of when investigative practices involving misrepresentations of identity and purpose nonetheless may be ethical.”⁶ Aside from D.C. Opinion 323 (2004) and Oregon Opinion 2005-173, which interpret certain language in Oregon’s explicit exception for “covert activity” (Rule 8.4(b)), we are aware of one other ethics opinion, from Utah, on the subject of

² See, e.g., *In the Matter of Malone*, 105 A.D. 2d 455; 480 N.Y.S.2d 603 (Third Dept 1984) (New York State Corrections Inspector General, a lawyer, advised informant to lie in arbitration testimony in order to protect the informant from retribution by fellow correctional officers; the lawyer was censured as a result).

³ Oregon’s Rule 8.4(b) provides an exception for lawyers to advise clients or supervise “lawful covert activity” in the investigation of violations of “civil or criminal law or constitutional rights” provided the conduct is otherwise in compliance with Oregon’s Rules of Professional Conduct and that “the lawyer 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.” *See also* Oregon Opinion 2005-173 (interpreting “advise and supervise” to mean a lawyer may not “participate directly” in the covert activity).

⁴ Alabama’s Rule 3.8(2) permits a government prosecutor to advise and order “any action that is not prohibited by law” and to have “limited participation in the action.”

⁵ Florida’s Rule 4-8.4(c) permits a government lawyer to supervise an “undercover investigation.”

⁶ ABA 01-422.

dissemblance in investigations.⁷ Utah’s Opinion 02-05 (2002) concludes that a government lawyer “who participates in a lawful covert governmental operation” that uses dissemblance “does not, without more, violate the Rules of Professional Conduct.”

Certain federal district courts have declined to suppress evidence gained through investigative dissemblance. In *Gidatex*, Judge Shira Scheindlin noted: “As for DR 1-102(a)(4)’s prohibition against attorney ‘misrepresentations’, hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation.”⁸ In *Cartier v. Symbolic, Inc.*, the same court cited *Gidatex* in refusing to find that Cartier’s use of an investigator demonstrated its consent to any alleged trademark infringement.⁹ The New Jersey District Court in *Apple Corps* stated that the Honesty Rule does “not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes.”¹⁰ The court rested its conclusion on the prevailing understanding in the legal profession, as evidenced in part by other courts’ decisions¹¹ and on statutory construction.¹²

More recently, another federal district court cited *Gidatex* for the proposition that, “prohibition against attorney misrepresentations in DR1-102(a)(4) is not applicable to use of undercover investigations initiated by private counsel in trademark infringement case.” *United States of America v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (upholding undercover law enforcement sting operation supervised by prosecutor).

While *Gidatex* and *Parker* appear to judicially sanction, as ethically permissible, the use of dissemblance in investigations, the specific issue of whether the use of dissemblance in investigations is ethical was not the actual holding in both cases. Much if not all of the judicial commentary on the issue of the ethical use of dissemblance is dicta. The *Gidatex* court observed that, “a court is not obligated to exclude evidence *even* if it finds that counsel obtained the evidence by violating ethical rules.” *Gidatex*, 82 F. Supp. 2d at 126 (emphasis in the original). Similarly, the *Parker* court also observed that, “even if the alleged misconduct, attributed by Defendants to the Government attorneys in this case, were deemed an ethical violation, and the relevant disciplinary rule were applicable to the instant facts, such does not warrant use of the exclusionary rule as a remedy for such violation.” *Parker*, 165 F. Supp. 2d at 477 (internal citations omitted). Simply put, these cases dealt primarily with the issue of admissibility of evidence -- not with the ethical issues in obtaining it.

Other courts throughout the country have struggled with this issue to mixed results. The Eighth Circuit in *Midwest Motor Sports* called for the suppression of evidence because it believed the attorneys could have obtained the

⁷ Cf., Ala. Opinion Ro-89-31 (permitting a lawyer to direct an investigator to pose as a customer in order to determine whether plaintiff lied about his injuries).

⁸ *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 119, 122 (S.D.N.Y. 1999).

⁹ *Cartier v Symbolix, Inc.*, 2006 U.S. Dist. LEXIS 71446 at *20 (S.D.N.Y. 2006).

¹⁰ *Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456, 475 (D. N.J. 1998)

¹¹ *Id.* (citations omitted).

¹² *Id.* at 475-576. New Jersey’s False Statement rule includes the word “material” unlike New York’s rule.

information through “formal procedures, such as a motion to compel.”¹³ Likewise the Supreme Court of Wisconsin in *In re Wood* held that an attorney in a dispute with a former client violated the Honesty Rule when he hired an investigator to pose as the former client in order to obtain a document, which “could have been subpoenaed.”¹⁴ In *Allen v. Int’l Truck & Engine*, the U.S. District Court for the Southern District of Indiana suppressed evidence because a company had sent investigators to talk to employees internally in response to allegations of racial hostility by plaintiff-employees, knowing that some of the employees were represented by counsel in the matter.¹⁵

On the other hand, the Seventh and Tenth Circuits have explicitly authorized the use of “testers” in racial discrimination cases, the Seventh Circuit noting that the “deception was a relatively small price to pay to defeat racial discrimination.”¹⁶ And the U.S. Supreme Court has upheld the standing of “testers” in such cases.¹⁷

The public and profession’s expectations with respect to dissemblance in investigations may evolve over time, and rules such as the Dishonesty Rule must be applied in the light of reason and experience.¹⁸ While we recognize that there is no nationwide consensus on this issue at this time, we conclude that the conduct approved by a number of courts as discussed above is most consistent with the overall purposes of the Disciplinary Rules and conforms to professional norms and societal expectations. Non-government attorneys 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 imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful

¹³ *Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693, 700 (8th Cir. 2003). The court observed that the investigator’s surreptitious recording *combined* with the fact that counsel had violated the no-contact rule should result in suppression. *Midwest* at 699. *See also Hill v Shell Oil Company*, 209 F. Supp. 2d 876, 880 (E.D. Ill. 2002) (noting a “discernable continuum in the cases from clearly impermissible to clearly permissible conduct.”).

¹⁴ *In re Wood*, 190 Wis. 2d 502; 526 N.W.2d 513, 514 (Wisc. 2005).

¹⁵ *Allen v Int’l Truck & Engine*, 2006 U.S. Dist. LEXIS 63720 at *25-26 (S.D. Ind. 2006)

¹⁶ *Richardson v. Howard*, 712 F.2d 319, 321-22 (7th Cir. 1983); *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973). The U.S. Supreme Court defined a “tester” as “an individual who, without an intent to rent or purchase a home or apartment, poses as a renter or purchaser for the purpose of collecting evidence of unlawful steering practices.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373; 71 L. Ed., 2d 214, 225 ; 201 S. Ct. 1114, 1121 (1982).

¹⁷ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373; 71 L. Ed., 2d 214, 225 ; 201 S. Ct. 1114, 1121 (1982).

¹⁸ *See, e.g.*, N.Y. State 328 (1974) (secret taping impermissible except under “extraordinary” circumstances); N.Y. County 696 (1993) (secret taping permissible where one party has consented); ABA 01-422 (taping permitted if legal and lawyer does not falsely deny the fact of recording); N.Y. City 2003-2 (permitting non-routine taping in “pursuit of a generally accepted societal good”). *See also* ABA 06-439 (in negotiations, posturing or puffery “are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely.”)

means¹⁹; 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.

CONCLUSION:

A plain reading of New York's Code of Professional Responsibility supports the view that it is generally unethical for a non-government lawyer to utilize and/or supervise an investigator who will employ dissemblance in an investigation if the dissemblance is unlawful; rises to the level of fraud or perjury; unlawfully violates the rights of third parties; otherwise violates the Code, or where other lawful means of obtaining evidence is available. Nevertheless, under certain exceptional conditions as set forth in this opinion, dissemblance by a non-attorney investigator supervised by an attorney is ethically permissible. Lawyers who supervise investigators employing dissemblance, however, should interpret these exceptions narrowly.

¹⁹ See *Midwest Sports* and *Wood* decisions described supra. In *Pautler*, the court noted that the DA "had several choices" other than dissemblance in pursuing the suspect's apprehension. *Pautler* at 1180.