

**Final**

**Rhode Island Supreme Court  
Ethics Advisory Panel Op. 2020-03  
Issued December 15, 2020**

FACTS

The inquiring attorney, who is also a law professor, seeks the Panel's guidance about whether he/she, and also law students, may serve as fair housing testers without violating the Rules of Professional Conduct. The inquiring attorney explains that fair housing testers are individuals who pose as potential renters or buyers in the real estate market in order to gather information regarding housing discrimination. He/she explains that in a typical test, testers pose as a Black couple who respond to an advertisement for an apartment available for rent, or to an advertisement for the sale of property. If the owner informs the couple that the apartment, or the property for sale, is no longer available, then in phase two of the test, testers posing as a white couple with a profile similar to the other couple would then respond to the advertisement. If the landlord offers the white testers a lease, or if the property owner agrees to a sale, the overall test results would constitute prima facie evidence of housing discrimination.

The inquiring attorney and the law students would serve as testers through a regional organization which is a longtime fair housing testing organization and a U.S. Department of Housing and Urban Development grantee required to abide by HUD's program standards. The inquiring attorney asks whether he/she, and the law students seeking admission to the Rhode Island Bar, would violate Rules 4.1, 4.2, 5.3, and 8.4(c) or any other Rules of Professional Conduct if they served as fair housing testers.

ISSUE PRESENTED

Does Rule 8.4(c) of the Rules of Professional Conduct permit the inquiring attorney to serve as a fair housing tester?

OPINION

It is not professional misconduct under Rule 8.4(c) for the inquiring attorney to serve as a fair housing tester in covert investigations of housing discrimination.

## REASONING

The Panel's jurisdiction is limited to providing guidance to members of the Rhode Island Bar. Therefore, the Panel does not address the conduct of law students as fair housing testers, except to note that supervising lawyers must make reasonable efforts to ensure that the conduct of law-student testers is compatible with ethics obligations of lawyers (Rule 5.3(b); and that supervising lawyers may be held responsible for a law student's conduct that would be a Rules violation if engaged in by the lawyers (Rule 5.3(c).)

Fair housing testing programs are lawful, government-sanctioned programs. According to the United States Department of Justice website, the Civil Rights Division at the Department of Justice sponsors the Fair Housing Testing Program which was established in 1991. Testing commenced in 1992, and is ongoing. The focus of the program is to uncover discrimination in housing based on race, national origin, color, religion, sex, disability, or familial status. The Department of Justice employs various means for testing, including private fair housing organizations, contracts with private individuals, as well as Department employees who serve as volunteer testers. The website explains that fair housing testing can be a valuable tool to investigate housing market practices, and has greatly enhanced the ability of the Department to identify discriminatory housing practices.

The United States Supreme Court approved fair housing testers in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). The Court in Havens Realty Corporation held that testers, that is, "...individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchases for the purpose of collecting evidence of unlawful steering practices," have standing to sue under the Fair Housing Act of 1968. Id. at 373-374.

The Seventh Circuit Court of Appeals noted, "This court and others have repeatedly approved and sanctioned the role of 'testers' in racial discrimination cases." Richardson v. Howard 712 F.2d 319, 321 (7<sup>th</sup> Cir. 1983) (citations omitted.) Vacating the district court's decision in favor of the defendant in a housing discrimination case, the court held that the testimony of a tester was wrongfully discredited simply because the witness was a professional tester. Id. The court commented:

It is frequently difficult to develop proof in discrimination cases and the evidence provided by testers is frequently valuable, if not indispensable. It is surely regrettable that testers must mislead commercial landlords and home owners as to their real intentions to rent or buy housing. Nonetheless, we have long recognized that this requirement of deception was a relatively small price to pay to defeat racial discrimination. Id.

The inquiring attorney seeks to serve as a fair housing tester. As such, he/she will be an active participant in a covert investigation with some amount of deception. As a fair housing tester, the inquiring attorney will pose as a potential renter or buyer with no intention of renting or buying.

He/she typically will provide property owners with a false identity and with fabricated income, assets, and occupation information. These aspects of fair housing testing programs may raise concerns for attorneys in light of Rule 8.4 which in pertinent part states:

Rule 8.4. **Misconduct.** It is professional misconduct for a lawyer to:

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

Comment [2] to Rule 8.4 provides:

*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. (Emphasis added.)*

In Apple Corps Ltd. v. Internat'l Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998), the plaintiffs believed that the defendants were marketing and selling stamps bearing the likeness of The Beatles in violation of a consent order. 15 F. Supp. 2d at 458. To investigate their suspicions, investigators under direction of counsel posed as customers. Id. at 462-464. After the plaintiffs moved for a contempt order, the defendants sought sanctions against the plaintiffs arguing a violation of Rule 8.4(c). Id. at 472. The court stated that Rule 8.4(c) "does not apply to misrepresentations solely as to identity or purpose and solely for evidence gathering purposes," and held that the plaintiffs' counsel did not violate Rule 8.4(c). Id. at 475, 476. The court stated: "The 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. Id. at 475; see also U.S. v. Parker, 165 F. Supp.2d 431 (W.D.N.Y. 2001) (ethics rule that prohibits dishonesty was not applicable where prosecutors supervise undercover investigations); Giadex v. Campaniello Imps., Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999) (ethics rule that prohibits dishonesty was not applicable where private attorney used undercover investigators posed as interior decorators in trademark infringement case).

Ethics committees have concluded that a lawyer's involvement in certain covert investigations is permissible. See Va. Ethics Op. 1765 (2003) (no violation of Rule 8.4(c) where attorney employed by federal intelligence agency uses lawful methods, such as 'alias identities' and non-consensual tape recording as part of intelligence activities); Utah Ethics Op. 02-05 (2002) (government lawyer who participates in lawful covert governmental operation involving conduct using dishonesty, misrepresentation, or fraud does not violate Rule 8.4(c)); Va. Ethics Op. 1738 (2000) (discussing that Rule 8.4(c) permits lawyers to make misrepresentations necessary for criminal investigations and for housing discrimination investigations.)

In North Carolina Ethics Op. 9 (2015), the ethics committee considered whether Rule 8.4(c) permitted a private lawyer, prior to filing a lawsuit, to retain a private investigator who would pose as a potential employee in the investigation into a client's employer's wage practices. N.C. Ethics Op. 9 at 1. The committee concluded that the ethics rules permitted a private lawyer to supervise an investigation involving misrepresentation if done in pursuit of a public interest, and if certain conditions were satisfied. Id. at 2. The committee stated:

In the pursuit of a legitimate public interest such as in investigations of discriminations in housing, employment and accommodations, patent and intellectual property infringement, and the production and sale of contaminated and harmful products, a lawyer may advise, direct, and supervise the use of misrepresentation (1) in lawful efforts to obtain information on actionable violations of criminal law, civil law, or constitutional rights; (2) if the lawyer's conduct is otherwise in compliance with the Rules of Professional Conduct; (3) the lawyer has a good faith belief that there is a reasonable possibility that a violation of criminal law, civil law, or constitutional rights has taken place, is taking place, or will take place in the foreseeable future; (4) misrepresentations are limited to identity or purpose; and (5) the evidence sought is not reasonably available through other means. Id.

In the instant inquiry, the inquiring attorney seeks to work as a fair housing tester under the supervision of an experienced testing organization. The organization is a HUD grantee that is required to abide by HUD's program standards that ensure best testing practices. Although the attorney's identity and other information as a tester will be misrepresented during the investigations, the program is a lawful operation. Further, the investigations of fair housing testers serve a legitimate public interest, namely, the detection of discrimination in housing. The Panel notes too, that Comment [2] to Rule 8.4 explains that the Rule applies to illegal conduct that reflects adversely on a lawyer's fitness to practice law, and also states that some kinds of offenses carry no such adverse implication. The Panel believes that the inquiring attorney's participation in covert activities in the context of lawful government and court approved fair housing investigations, does not reflect adversely on the inquiring attorney's fitness to practice law, and cannot be said to constitute misconduct under the Rules.

Lastly, the Panel does not address Rules 4.1 (Truthfulness in statements to others) and 4.2 (Communication with person represented by counsel) as both rules apply during the course of client representation, a situation not presented by the facts of this inquiry. The inquiring attorney has stated that HUD guidelines require that testing will cease upon notice that a housing provider that is being investigated has retained counsel.

Accordingly, the Panel concludes that it is not professional misconduct under Rule 8.4(c) for the inquiring attorney to serve as a fair housing tester in covert investigations of housing discrimination.