Comment on proposed change to Colorado Rules of Professional Conduct - rule 8.4(c)

Making rule 8.4(c) less restrictive is good, however, the proposed language is still too restrictive.

The proposed new rule recites: "...engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."

The proposed new rule should instead recite: "...engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may participate in lawful investigative activities." The comment for the rule could specify that "participation" includes advising, directing, or supervising others, including clients, law enforcement officers, or investigators in lawful investigative activities.

This rewording should be made for at least two reasons. First, it would not make sense for a lawyer to be able to directly supervise activities that they could not themselves perform. Second, entering the proposed rule without this further change would favor large firms over solo practitioners and small firms, because many small law firms would not have the resources to hire an investigator.

Changing the rule risks permitting some undesirable activity under this rule, however, this risk is mitigated when viewed within a broader context, which includes all the rules and laws which apply to a lawyer's conduct.

Comments on Rule 250 & 260. Mandatory Continuing Legal and Judicial Education

Comment on 250.2(1): It is not clear why "live-credits" are needed. This extra tracking requirement will be burdensome.

Comment on 250.2(2): Colorado could make itself a more welcoming jurisdiction by allowing attorneys to select a compliance period and period start date. This would allow practitioners admitted in more than one state to meet their multi-state CLE requirements in a more comprehensive manner. Computerized CLE tracking should make tracking relatively easy, even if there are numerous compliance options.

Comment on 250.9(1)(b): Making these records fully public is not a good idea for many reasons. Lawyers and judges often attend CLE events and conferences regularly. Given the prevalence of violent attacks on judges and attorneys in some areas of law, a stalker could plan an attack based on CLE records made public. CLE events may include networking opportunities that someone does not wish to disclose to a competitor. CLE conferences may be expensive events, held at places like Vail and Aspen; attendance could lead to bad publicity for some lawyers. A young attorney contemplating a career change may want to attend a CLE on a topic without telling their employer. Making CLE records fully public would have a chilling effect.

Comment on 250.9(2): Making accreditation information fully public will have unintended consequences. A lot of work goes into preparing a CLE presentation and making it fully public will lead to presenters having their research and materials copied without permission. Also, many presenters are unsophisticated about copyright laws and inadvertently incorporate copyrighted images or other material in their presentations. This could lead to CLE trolls sending demand letters demanding payment for even *de minimus* uses, which might be embarrassing, even if there might be a fair use defense.

Comment on 250.9(3): Specifying exact time periods for record expungement – rather than a range or merely specifying "a reasonable time period" – is too restrictive and imposes an unnecessary regulatory burden and cost. Also, considering that these rules are intended to apply many years in the future, it is too inflexible and may not be compatible with future administrative systems.

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Office of the Attorney General

September 5, 2017

Colorado Supreme Court
c/o Cheryl Stevens, Chief Deputy Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

RE: Proposed Amendment to Colorado Rule of Professional Conduct 8.4(c)

Dear Chief Justice Rice and Members of the Court:

Thank you for the opportunity to submit comments in response to your proposed amendment to Colorado Rule of Professional Conduct 8.4(c) ("Rule 8.4(c)" or "the Rule"). The Colorado Attorney General's Office strongly supports the proposal.[1] Undercover investigations are a vital law enforcement tool. Law enforcement agents engaged in undercover investigations need the expert advice of government lawyers to ensure that their actions comply with the letter and spirit of the law and produce reliable, admissible evidence to support their criminal prosecutions and civil or regulatory enforcement actions. The proposed amendment, if adopted, will ensure that the Rules are not misapplied to endanger the vigilant and lawful pursuit of justice.

In 2012, my predecessor John Suthers helped draft an identical proposal to amend Rule 8.4(c). In our testimony before the Standing Committee on the Rules of Professional Conduct, we explained that we were then involved in a federal court action, brought jointly with the Federal Trade Commission, in which the FTC used

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[1] In an original petition filed under C.A.R. 21, my office recently argued that a change to Rule 8.4(c) is unnecessary because a lawyer who supervises a lawful undercover investigation or provides advice to undercover law enforcement officers is not engaged in the type of "dishonesty, fraud, deceit, or misrepresentation" prohibited by the Rule. *See In Re: Cynthia H. Coffman v. Office of Attorney Regulation Counsel*, No. 2017 SA 92 (Colo. 2017). I stand by those arguments, but I welcome a clarification of Rule 8.4(c) to ensure that the Rule is not misapplied. I also urge the Court to consult the C.A.R. 21 petition during the rulemaking process. It provides additional information about the unique importance of the Court's proposed amendment to Colorado's law enforcement officials, the current case law on undercover investigations, and the manner in which other jurisdictions have addressed the question.

undercover shoppers as part of its investigation. The defendants challenged that undercover investigation as "unethical" and sought sanctions against the lawyers prosecuting the case. That real-world example of the misapplication of ethical standards demonstrated an urgent need to clarify Rule 8.4(c).[2]

Despite debating the proposed amendment for a year and a half, the Standing Committee could not reach consensus. Nonetheless, the Committee recognized that government lawyers had been providing advice to undercover investigations for years, and would continue to do so. Thus, since 2012, government lawyers across the State have continued to do what they have long done: supervise undercover operations to ensure that they are carried out lawfully and effectively.

Although the sense of urgency to clarify Rule 8.4(c) faded after the Standing Committee considered the issue in 2012, it was recently rekindled. In late 2015, a formal ethics complaint was filed against the Jefferson County District Attorney. For many years, that district attorney's office housed an undercover investigative unit, called "CHEEZO," that successfully rooted out hundreds of online sexual predators. The ethics complaint asserted, among other allegations, that the involvement of lawyers in reviewing CHEEZO investigations, and in providing legal advice to investigators, violated Rules 5.3 and 8.4(c). The complaint was spurious—it represented an attempt to undermine a defendant's conviction despite the courts having reviewed, and approved, the undercover techniques used in his prosecution. But faced with threatened disciplinary action, District Attorney Peter Weir elected to disband this highly effective investigative unit. The unit was later reorganized in the county sheriff's office, but the question remained: can Colorado's prosecutors continue to advise undercover operations?

The Attorney General's Office faces similar concerns about the potential for discipline against its lawyers, who, in the wake of the CHEEZO complaint, have been forced to discontinue their supervision of and advice to lawful undercover investigations. However, my office does not have the option of outsourcing our in-house investigators, and neither do a number of other state and federal law enforcement and regulatory offices. Nor can my office effectively participate in undercover investigations without the oversight of our lawyers. Consequently, the saga involving the Jefferson County CHEEZO unit has significantly undermined my office's ability to effectively use a perfectly lawful and strictly necessary law enforcement technique. In light of these recent events, it is critical that any uncertainty about Rule 8.4(c)'s application to lawful undercover activities be resolved quickly and definitively.

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[2] The court ultimately did not rule on this issue. *Federal Trade Comm'n v. Dalbey*, No. 11-CV-1396-RBJ-KLM, 2013 WL 941821, at *2 (D. Colo. Mar. 11, 2013).

I. Undercover Investigations Are Critically Important to Civil and Criminal Law Enforcement.

Undercover and other covert investigative tactics are accepted and critically important tools for law enforcement officers. Without these tools, many criminal conspiracies, schemes to defraud consumers or restrain competition, and violations of state regulatory regimes would go undetected. In my office, criminal investigators have gone undercover to infiltrate drug smuggling conspiracies, prostitution rings, and myriad other criminal enterprises. In the civil enforcement context, investigators have posed as consumers, family members, medical patients, and members of the business community to expose fraudulent sales pitches, illegal prescription or medical treatment practices, and invitations to participate in conspiracies to raise or fix prices. Investigators in other state regulatory agencies have posed as prospective clients of unlicensed professionals or have used operatives to uncover the illegal sale of cigarettes or alcohol to minors. All of these time-proven investigative tactics have been recognized as not only lawful but, in many instances, the only effective means of uncovering illegal conduct designed to avoid detection.

Courts have long recognized the need for undercover investigative techniques. Over a half-century ago, the United States Supreme Court held that "in the detection of many types of crimes, the Government is entitled to use decoys and to conceal the identity of its agents." *Lewis v. United States*, 385 U.S. 206, 209 (1966). This Court also has approved covert law enforcement activities for over 30 years, recognizing that "[m]any crimes ... could not otherwise be detected unless the government is permitted to engage in undercover activity." *People in Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988). Covert investigations are even permissible as the basis for lawyer disciplinary actions. *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986) (approving the evidentiary use of secretly recorded conversations with a lawyer who offered to assist in organizing a prostitution ring).

Commentators cite two primary reasons why covert investigations are in the public interest: utility and necessity. As one commentator explained, "[i]nvestigative deception, in addition to being useful, is also often necessary in dealing with crimes and criminals. Prosecutors and police often need to use deceit to find the truth, because criminal activity tends to be clandestine." Kevin C. McMunigal, *A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions: Investigative Deceit*, 62 HASTINGS L.J. 1377, 1392 (2011). Other commentators have described covert investigations as an "indispensable means of detecting and proving violations that might otherwise escape discovery or proof." David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 GEO. J. LEGAL ETHICS 791, 802 (1995). Given the realities of clandestine criminal conduct, undercover operations will occur with or without the supervision of government lawyers. But that supervision is crucial, as experience bears out.

II. Prosecutors and Government Attorneys Play a Crucial Advisory Role in Undercover Investigations.

Covert investigations can raise many challenges. One obvious concern is the physical safety of law enforcement officers. But difficult questions also arise from the legal and constitutional maze investigators must navigate to ensure that any evidence collected as part of the investigation is admissible in resulting prosecutions or enforcement actions. The American Bar Association *Standards for Criminal Justice: Prosecutorial Investigations* ("ABA Standards") identify a number of issues a prosecutor must consider when advising an undercover operation, including

- unnecessary intrusions or invasions into personal privacy;
- entrapment of otherwise innocent persons;
- interference with privileged or confidential communications;
- interference with or intrusion upon constitutionally protected rights; and
- agent involvement in illegal conduct that would be considered offensive to public values and may adversely impact a jury's view of a case.

ABA Standard 26-2.3(d).

Because law enforcement officers need expert legal advice to navigate these complex issues, the ABA recognizes that lawyers can, consistent with their ethical obligations, supervise covert investigations—indeed, the ABA specifically directs lawyers to do so. *See* ABA Standards 1.2 & 1.3. The ABA Standards instruct prosecutors to "provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use." ABA Standard 1.3(g). The reasons for this approach are obvious. "Police errors during an investigation ... can impair or entirely undermine a case." Commentary to ABA Standard 1.3(b). Equally important, lawyer supervision protects the rights of the target of an investigation. ABA Standards 1.2, 2.2, & 2.3. Given the pivotal role lawyers play in undercover operations, "[a] prosecutor would not be doing his job effectively if he or she refused to give an officer accurate legal advice to help the officer prepare to conduct a lawful undercover operation or interrogation, especially when the entire case migh[t] rest on the admissibility of the evidence." H. Morley Swingle & Lane P. Thomasson, *Feature: Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (2013); *accord* ABA Standard 1.3, Commentary to Subdivision 1.3(g) (explaining that ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations").

The Ethics Committee of the Colorado Bar Association, recognizing that prosecutors and other government lawyers "have begun to play a larger role in pre-arrest and pre-indictment investigation," has expressed a similar public policy

sentiment. Colo. Bar Ass'n Comm. on Ethics, Formal Op. 96 (1994) (rev. 2012). It acknowledged that the "trend [of lawyer supervision] has been viewed positively by the general public and the bar because of the perception that a lawyer's involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards." *Id.*; *see also* Colo. Bar Ass'n Comm. on Ethics, Formal Op. 112 (2003) (explaining that although "surreptitious recording ... may involve an element of trickery or deceit," government attorneys should be allowed to use surreptitious recordings "for the purpose of gathering admissible evidence" because "attorney involvement in the process will best protect the rights of criminal defendants"). These policy rationales explain why so many jurisdictions have explicitly adopted changes to their ethical rules to protect the supervisory role of government attorneys in covert investigations.

III. Jurisdictions Across the Country Have Adopted Similar Rule Changes without Any Negative Effect on Legal Professionalism.

For over a decade, the trend around the country has been to recognize that lawyer supervision of, or advice to, undercover investigators does not violate ethical rules. At least 19 jurisdictions have specifically approved attorney supervision of undercover investigations, whether through rule amendments, comment amendments, or ethics opinions.

For example, in 2009 Alabama amended its version of Rule 3.8 to recognize that prosecutors may advise or encourage investigators "to engage in any action that is not prohibited by law." Ala. Rules of Prof. Conduct Rule 3.8(2) (2009 amendment). Taking a different approach—similar to this Court's proposed amendment—Florida amended its version of Rule 8.4(c) to recognize 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, unless prohibited by law or rule." Fla. Bar Reg. R. 4-8.4 (2009 amendment). Similarly, other States have expressly added a "fitness to practice law" limitation on the reach of their versions of Rule 8.4(c), specifying that lawyer supervision of undercover investigations does not reflect adversely on a lawyer's fitness to practice and is not subject to discipline. *See* Michigan RPC 8.4(b) (1988); North Dakota RPC 8.4(c) (2006); Oregon RPC 8.4(a)(3) (2005); Tennessee RPC 8.4(c), cmt. [5] (2003); Virginia Sup. Ct. R., Part. 6, § II, 8.4(c) (2003).[3]

My office has consulted with the Director of the Center for Ethics & Public Integrity at the National Attorneys General Training and Research Institute, to determine whether these 19 jurisdictions have seen any degradation in attorney professionalism. Despite her nationwide expertise, she disclosed no indication that

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[3] See Addendum A for a full list of these amendments and ethics opinions.

the widespread trend in favor of amending Rule 8.4(c) and related rules has had any negative effect anywhere in the country.[4]

IV. The Primary Arguments against the Proposed Amendment Are without Merit.

When the Standing Committee considered an identical amendment to Rule 8.4(c) in 2012, opponents raised two principal concerns: first, that adoption of an amendment to Rule 8.4(c) would lead the legal profession down a "slippery slope" in which deception would become an increasingly accepted mode of dealing among lawyers; and, second, that lawyers should never lie, under any circumstances. Neither concern is warranted.

A. The proposed amendment will not lead the legal profession down a "slippery slope."

Fears that the proposed amendment would create a "slippery slope" are contrary to experience. The proposed amendment does not change the status quo in Colorado. Testimony before the Standing Committee in 2012, and comments by members of that Committee, acknowledged that undercover investigations are ongoing and lawyers have been supervising them or providing advice to facilitate them for years. And yet, at the time, not one witness or member of the Standing Committee could recall a single disciplinary action arising out of such conduct. And no one has suggested that attorney supervision of covert investigations in Colorado has raised any legitimate, real-world ethical concern.

Indeed, if the proposed amendment were adopted, Colorado's lawyers would remain subject to numerous ethical restrictions on their ability to supervise improper undercover investigations. For example, Rule 4.2 prohibits a lawyer from using an undercover agent to communicate with a person the lawyer knows to be represented by another lawyer in the matter, unless "authorized by law." And Rule 4.4 prevents a lawyer from using undercover agents to obtain evidence from any person in a way that "violates the legal rights of such a person." Examples include conduct designed to interfere with privileged or confidential communications with another lawyer, an accountant, a member of the clergy, a

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[4] Significantly, there has been no reported disciplinary action against ***any*** attorney for conduct related to the supervision of an undercover investigation in any State that amended its ethics rules. *But compare Disciplinary Counsel v. Brockler*, 48 N.E.3d 557, 560 (Ohio 2016) (Upholding discipline against a prosecuting attorney when he ***himself*** created a false Facebook profile in order to communicate with alibi witnesses for a murder suspect just prior to trial. The court found that this conduct "prejudiced the administration of justice because it had the potential to induce false testimony." This Court's proposed rule amendment would not condone this conduct, which would remain unethical and subject to potential discipline.).

health care practitioner, or a spouse. Further, Rule 8.4(h) addresses a wide range of wrongful behavior, proscribing "conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law." Further restrictions include the duty of candor toward the tribunal (Rule 3.3); prohibitions on criminal conduct by a lawyer (Rule 8.4(b)); and prohibitions on conduct prejudicial to the administration of justice (Rule 8.4(d)).

Finally, when private lawyers have overstepped the bounds of legitimate undercover activities, courts have been quick to step in. *See, e.g., Leysock v. Forest Labs., Inc.*, No. 12-11354-FDS, 2017 WL 1591833 (D. Mass. 2017) (decrying an elaborate ruse in the form of a phony survey of physicians to gain access to patient treatment files); *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074 (D. Colo. 2009) (finding improper a "surreptitiously recorded interview ... occurring on the day this action was commenced"); *In re Curry*, 880 N.E.2d 388, 392 (Mass. 2008) (finding improper "an elaborate subterfuge whose purpose was to induce or coerce [a] judge's former law clerk into making statements that the law clerk otherwise would not have made about the judge and her deliberative process"); *see also Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003) (finding unethical the use of an undercover investigation to talk with person represented by counsel in pending litigation in order to obtain "information that could have been obtained properly through the use of formal discovery techniques"); *Allen v. Int'l Truck and Engine*, No. 1:02-CV-0902-RLY-TAB, 2006 WL 2578896 (S.D. Ind. 2006) (Magistrate Judge recommended public censure of attorneys who directed an investigator to communicate with represented plaintiffs and potential class members in pending discrimination lawsuit).[5] These cases highlight the tools available to courts and disciplinary authorities to ensure that lawyers promote respect for ethical rules and the law, rather than push the bounds of acceptable conduct.

B. Rule 8.4(c) has never covered every potential instance of dishonesty or misrepresentation.

The second objection to the proposed rule change is based on the notion that lawyers are absolutely prohibited from making or participating in any false statement. Yet this has never been true. Many courts have recognized the illogic in applying Rule 8.4(c) so woodenly. "Common sense dictates that the prohibition on Rule 8.4(c) must be qualified in some way. Otherwise, the absurd result that would follow is that [lawyers], by virtue of their professional license, could be subject to discipline for lying to anyone under any circumstance in any aspect of their lives."

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[5] These cases all involve private sector attorneys. According to my office's research, no government attorney anywhere in the country has been disciplined solely for supervising undercover investigators or for providing legal advice to ensure that undercover operations are conducted within the bounds of the law.

In re Hurley, No. 07 AP 478-D, 2008 Wisc. LEXIS 1181, at *18 (Wisc. Feb. 5, 2008). The Oregon Supreme Court, for example, has recognized that

> [n]ot every lawyer misstatement poses [a] risk [to the integrity of the legal profession]: telling the story of Santa Claus to children is an example. Instead, there must be a rational connection between the conduct that gives rise to an allegation of a rule violation and the purpose of the lawyer discipline system.

In re Conduct of Carpenter, 95 P.3d 203, 208 (Ore. 2004). The Vermont Supreme Court agrees: "[c]learly [Rule 8.4(c)] does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement." *In re PRB Docket No. 2007-046*, 989 A.2d 523, 529 (Vt. 2009) (parenthetically quoting D.C. Bar Legal Ethics Comm. Op. 323 (2004)). Thus, "the literal application of the prohibition of RPC 8.4(c) to any 'misrepresentation' by a lawyer, regardless of its materiality, is not a supportable construction of the rule," and the Rule cannot be read to prohibit lawyer supervision of undercover investigations. *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 475 (D.N.J. 1998).

As the ABA recognizes, deceptive conduct triggers attorney discipline only when the deception "adversely reflects on the lawyer's fitness to practice law." *ABA Standards for Imposing Lawyer Sanctions*, Standard 5.1. The notion that the proposed amendment to Rule 8.4(c) will lead to lawyer abuse through new forms of deception is unfounded.

V. A Comment to Accompany the Proposed Rule, While Unnecessary, Could Offer Additional Clarity for Attorneys Serving in Law Enforcement Roles.

My office supports the proposed amendment to Rule 8.4(c) as written. But to the extent the Court believes that a comment to the Rule could provide additional clarity, we offer suggestions for a comment here. We urge only that consideration of a comment not further delay the much-needed clarification to Rule 8.4(c).

The following language could be added as a new comment [3] to Rule 8.4:

> [3] A lawyer's appropriate involvement in lawful investigative activities, standing alone, does not reflect adversely on the lawyer's fitness to practice. While a lawyer may advise, direct, or supervise others who participate in lawful investigative activities, a lawyer shall not personally participate in such activities if they involve dishonesty, fraud, deceit, or misrepresentation. However, it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer (e.g., by a law enforcement or regulatory agency) to participate in lawful investigative activities,

> regardless of whether they involve dishonesty, fraud, deceit, or misrepresentation.

In addition to providing additional explanation for the rule change as a general matter, this proposed comment also addresses one particular concern of law enforcement, explaining that lawyers employed in capacities other than as lawyers may personally participate in undercover investigative activities.

This comment would provide guidance for those federal and state law enforcement officers who happen to be licensed attorneys. As this Court noted in *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002), there is no "law enforcement exception" to the Rules of Professional Conduct. The respondent in *Pautler*, however, was acting in his capacity as a lawyer—not as a law enforcement officer—when he posed as a public defender in an attempt to encourage a suspected serial killer to surrender to police. In contrast, law enforcement officers engaged as police officers, sheriff's deputies, or F.B.I. agents may hold law degrees, but that credential is secondary to their law enforcement mission; they are not acting as lawyers. Thus, they should not be restricted from personally participating in covert investigations. Several States, including Missouri and Florida, have recognized this unique circumstance by adding additional language to their amendments to Rule 8.4(c). *See, e.g.*, Mo. Sup. Ct. R. 4-8.4(c); *accord* Fla. Bar Reg. R. 4-8.4. The comment suggested above offers the same clarification without unnecessarily complicating the proposal before the Court.

VI. Conclusion

Forcing investigators and law enforcement officers to conduct covert activities without attorney supervision—and forcing government lawyers to ignore those activities as a protective measure against potential ethics complaints—is not in the public interest. In contrast, allowing attorneys to work in concert with investigators and law enforcement officers ensures that covert investigations are conducted lawfully, that the justice system works effectively, and that the rights of victims and suspects are honored.

The recent ethics complaint filed against the Jefferson County District Attorney, which forced the Colorado Attorney General's Office to discontinue our own in-house undercover investigations, demonstrates the urgent need for clarity in this area. I respectfully urge the Court to adopt its proposed amendment to Rule 8.4(c).

Sincerely,

Cynthia H. Coffman

ATTORNEY GENERAL

Addendum A to the Attorney General's Comment Letter dated September 5, 2017 Supporting Amendment to Colo. RPC 8.4(c):

Summary of Rules, Comments, and Ethics Opinions Approving Lawyer Supervision of Undercover Activities

Addendum A to Attorney General's Comment Letter Dated September 5, 2017 Supporting Amendment to Colo. RPC 8.4(c):

Summary of Rules, Comments, and Ethics Opinions Approving Lawyer Supervision of Undercover Activities

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1. ALABAMA

Amendment to Ala. Rules of Prof. Conduct Rule 3.8(2) (2009):

> (2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:
>
> (a) Notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and
>
> (b) To the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Amendment to Comment to Ala. RPC 3.8(2) (2009):

> Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting

operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law.

Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.

Ala. State Bar Office of General Counsel Ethics Op., RO-2007-05 (2007):

During pre-investigation of possible infringement of intellectual property rights, may a lawyer employ private investigators to pose as potential customers under the pretext of seeking services of the suspected infringers in the same manner as a member of the general public? *Id.* at 1.

Disciplinary Commission agrees with and adopts the rationale expressed by the court in *Apple Corps Limited, MPL v. International Collectors Society*, 15 F. Supp. 2d 456, 476 (D.C. N.J. 1998) wherein the court held that lawyers and private investigators conducting a pre-litigation investigation may misrepresent their identity and purpose to detect ongoing violations of the law where it would be difficult to discover those violations by any other means. Such misrepresentations, limited in scope to identity and

purpose, do not constitute "dishonesty, fraud, deceit or misrepresentation" proscribed by Rule 8.4(c), Ala. R. Prof. C. *Id.* at 4-5.

2. ALASKA

Repromulgated Alaska R. Prof. Conduct 8.4, cmt. [4] (Supreme Court Order No. 1680, Apr. 15, 2009):

> [4] This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.

3. ARIZONA

Arizona Ethics Opinion 99-11 (Sept. 1999):

> Whether an attorney ethically may hire a private investigator to pose as someone interested in being admitted to a post secondary school using the client's actual work as a sample for admission, in order to gather facts for a civil suit.
>
> The rules themselves should be harmonized in order to prevent unnecessary conflict and should not be used as a shield to hide discrimination. In such cases, the lawyer's essential purpose is to evaluate the facts against the legal standards. It is many times essential for a lawyer to use

"testers" in order to meet the attorney's responsibilities under the ethical rules.

While recognizing the tension between the purposes of the conduct and rules, Isbell and Salvi [David B. Isbell & Lucantonio N. 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 Georgetown Journal of Legal Ethics 791 (1995)] come to the conclusion that when a lawyer directs a tester or investigator to make misrepresentations solely about their identity or purpose in contacting the person or entity who is the subject of investigation, and when the misrepresentations are made only for the purposes of gathering facts before filing a lawsuit by a lawyer who supervises or directs the tester's activities, the lawyer's conduct does not violate any provision of the model rules. Id. at 829. It is an opinion with which the Committee must agree. The ethical rules are not meant to prohibit the legitimate conduct which is contemplated by the hypothetical presented.

4. DISTRICT OF COLUMBIA

D.C. Bar Appx. A, Rule 4.2, cmt. [12] (2007 Revisions):

[12] This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

D.C. Bar Ethics Opinion 323 (Mar. 2004):

Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.

[I]n rejecting the formulation of "moral turpitude" and substituting the current anti-deceit formulation, the District of Columbia Court of Appeals has indicated its intention to limit the scope of Rule 8.4 to conduct which indicates that an attorney lacks the character required for bar membership. As the Comments elaborate, this may include "violence, dishonesty, breach of trust, or serious interference with the administration of justice." D.C. Rule 8.4, Comment [1].3 But, clearly, it does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.

5. FLORIDA

Amendment to Fla. Bar Reg. R. 4-8.4 (*See In re Amendments to the Rules Regulating the Fla. Bar*, 24 So. 3d 63, 144 (Fla. 2009)):

A lawyer shall not:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except 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, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.

Amendment to Comment to Fla. Bar Reg. R. 4-8.4(c) (*See In re Amendments to the Rules Regulating the Fla. Bar*, 24 So. 3d 63, 145 (Fla. 2009)):

> Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.

6. IOWA

Amendment to Iowa R. of Prof'l Conduct 32:8.4(c), cmt. [6] (Court Order Apr. 20, 2005, effective July 1, 2005):

> [6] It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when 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. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an

intelligence-gathering activity, does not, without more, violate this rule.

7. MICHIGAN

Amendment to MRPC 8.4(b) (1988):

It is professional misconduct for a lawyer to:

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

8. MISSOURI

Amendment to Mo. Sup. Ct. R. 4-8.4(c) (Apr. 27, 2012, effective July 1, 2012):

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations.

Amendment to Mo. Sup. Ct. R. 4-8.4(c), cmt. [3] (Apr. 27, 2012, effective July 1, 2012):

> [3] Rule 4-8.4(c) recognizes instances where lawyers for criminal law enforcement agencies, regulatory agencies, or the state attorney general advise others about or supervise others in undercover investigations and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these entities. This exception is not intended to state or imply that an entity has the authority to conduct undercover investigations unless that authority is separately granted to the entity by law. Although the exception appears in this rule, it is also applicable to Rules 4-4.1 and 4-4.3. This exception does not authorize conduct otherwise prohibited by Rule 4-4.2. Nothing in the rule allows the lawyer to advise others about or supervise others in undercover investigations unless the criminal law enforcement agency, regulatory agency, or state attorney general is authorized by law to engage in such conduct.

9. NEW YORK COUNTY LAWYER'S ASSOCIATION

NYCLA Professional Ethics Committee Formal Op. 737 (May 23, 2007):

> Under what circumstances, if any, is it ethically permissible for a nongovernment lawyer to utilize the services of and supervise an investigator if the lawyer knows that dissemblance will be employed by the investigator? *Id.* at 1.
>
> 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. *Id.*

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. *Id.* at 2.

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. *Id.* at 3.

10. NORTH CAROLINA

Amendment to N.C. R. Prof. Conduct 4.2, cmt. [4] (Mar. 1, 2003):

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The

Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.

Amendment to N.C. R. Prof. Conduct 8.4, cmt. [1] (Mar. 1, 2003):

[1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.

97 N.C. Formal Ethics Op. 10 (Jan. 16, 1998):

May a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell?

Yes, provided the prosecutor also instructs the officers to conduct their listening activities within all applicable constitutional and statutory limitations and, where necessary, to explain those limitations to the officers. This opinion is limited to the conduct of prosecutors.

2014 N.C. Formal Ethics Op. 9 (July 17, 2015):

Prior to filing a lawsuit, may Attorney A retain a private investigator who will misrepresent his identity and purpose when conducting an investigation into E's wage payment practices?

In the pursuit of a legitimate public interest such as in investigations of discrimination 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. A lawyer may not advise, direct, or supervise the use of misrepresentation to pursue the purely personal interests of the lawyer's client, where there is no public policy purpose, such as the interests of the principal in a family law matter.

This opinion does not apply to the conduct of a government lawyer. As explained in comment [1] to Rule 8.4, the prohibition in Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a government lawyer from providing legal advice to investigatory personnel relative to any action such investigatory personnel are lawfully entitled to take.

11. NORTH DAKOTA

Amendment to N.D.R. Prof. Conduct Rule 8.4(c) (2006):

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer.

12. OHIO

Amendment to Ohio Prof. Cond. Rule 8.4(c), cmt. [2A] (2007):

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

13. OREGON

Amendment to Ore. RPC 8.4(a)(3) (2005):

(a) It is professional misconduct for a lawyer to:

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law

Amendment to Ore. RPC 8.4(b) (2005):

(b) 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. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when 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.

Ore. Formal Ethics Op. 2005-173 (Aug. 2005)

A lawyer's involvement in covert activity is not protected by Oregon RPC 8.4(b) when, as here, there are no "violations of civil law, criminal law, or constitutional rights" to investigate. *Id.* at 5.

Oregon RPC 8.4(b) is meant to permit a lawyer only to provide advice and supervision regarding covert activity, not to participate directly in that activity. *Id.* at 6.

Oregon RPC 8.4(b) requires both an honest subjective belief in the possibility that unlawful activity "has taken place, is taking place or will take place in the foreseeable future," and some rational basis for that belief. The rule does not encompass a good-faith belief merely in a "possibility" of unlawful activity, but a good-faith belief in a "reasonable possibility" of such activity. *Id.* at 8.

14. SOUTH CAROLINA

Amendment to Rule 4.1(a), RPC, Rule 407, SCACR, cmt. [2] (2005):

[2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.

15. TENNESSEE

Amendment to Tenn. RPC 8.4(c), cmt. [5] (2003):

[5] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

16. UTAH

Utah Ethics Advisory Opinion 02-05 (Jan. 4, 2002):

What are the ethical considerations for a governmental lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or deceit? *Id.* at ¶ 1.

In our view, Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations. We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or "covert" operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. We do hold, however, that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c)

based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation. *Id.* at ¶ 10.

17. VIRGINIA

Amendment to Va. Sup. Ct. R., Part. 6, § II, 8.4(c) (2003):

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

Va. Legal Ethics Opinion 1738 (Apr. 13, 2000):

[A]re there circumstances under which an attorney, or an agent under the attorney's direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge? *Id.* at 1.

If the lawyer directly supervises police or other non-lawyer investigators who employ tactics that are regarded as unethical, then such behavior is imputed to the lawyer who faces discipline. Rules 5.3(c)(1) and 8.4(a). To avoid these consequences, the lawyer may choose to exercise no control or supervision over the investigator. This can result in police being deprived of critical legal guidance or, in a civil case, an unsupervised investigation in which important matters may have been overlooked that might have been discovered had the investigator been supervised. *Id.* at 10.

[T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to

participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. *Id.* at 12-13.

Va. Legal Ethics Opinion 1765 (June 13, 2003):

> [I]ntelligence and covert activities of attorneys working for the federal government are an appropriate exception under the new language of Rule 8.4(c), with its additional language limiting prohibition only to such conduct that "reflects adversely on the lawyer's fitness to practice law." Accordingly, the committee opines that when an attorney employed by the federal government uses lawful methods, such as the use of "alias identities" and non-consensual tape recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c). *Id.* at 3.

18. WISCONSIN

Amendment to Wis. SCR 20:4.1(b) (2007):

> (b) Notwithstanding par. (a), SCR 20:5.3(c)(1), and SCR 20:8.4, a lawyer may advise or supervise others with respect to lawful investigative activities.

Wis. SCR 20:4.1(b), Committee Comment (2007):

> Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. *See* SCR 20:1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception,

however, serious questions arise. *See* SCR 20:8.4(c). Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception

Lawful investigative activity may involve a lawyer as an advisor or supervisor only when 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.

19. WYOMING

Amendment to WY Prof. Conduct Rule 3.8 (b), cmt. [2] (2014):

[2] Rule 3.8(b) is not intended to prohibit prosecutors from participating directly or indirectly in constitutionally permissible investigative actions. Therefore, for purposes of the Rule, "the accused" means a person who has been arrested and brought before a magistrate, or a person against whom adversarial judicial criminal proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. In addition, a prosecutor may ethically advise law enforcement officers regarding the full range of constitutionally permissible investigative actions, including lawful contacts with a suspect, target, or defendant.

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Colorado Supreme Court
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Re: Proposed Amendment to C.R.P.C. 8.4(c)

The Colorado Criminal Defense Bar (CCDB), an association of nearly 1000 criminal defense lawyers, investigators and paralegals, urges the Court to reject the proposed change to Rule 8.4(c). The change is unnecessary, would unleash unpredictable results, and would bring disrepute on the profession. The rule should be left as is.

The proposed change is as follows:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) - (b) [NO CHANGE]

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

(d) –(h) [NO CHANGE]

This rule change request arises from the rejection of a Rule 21 Petition filed by the Attorney General against the Office of Regulation Counsel. The AG asserted she was unable to conduct undercover investigations by virtue of a settlement reached between Regulation Counsel and the First Judicial District Attorney. That matter was resolved when the District Attorney moved an in-house undercover operation to the Jefferson County Sheriff's Office, thereby eliminating lawyer involvement and achieving compliance with the current Rule. From this, the AG rightly surmised that staff in her office could not engage in undercover activities involving dishonesty.

Rather than farm this work out to non-lawyer entities, as was done by the 1st Judicial District Attorney, the AG seeks to change the rule. By its terms, the amendment would, first, allow lawyers to "advise" others regarding the

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lawfulness of their conduct. Second, it would permit lawyers to "direct, or supervise" deceptive practices of others, - practices in which they could not otherwise engage.

At the outset, the CCDB does not object to a rule change that would allow an attorney to "advise" others who seek to participate in lawful investigative activities, though doing so would be redundant. Such entities, and the public at large, are better served if counsel is available to assist in conforming the entities' conduct to the law. After all, "almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld." Rule 1.6, Comment [2]. Yet a rule change to achieve this laudable goal is unnecessary. Rule 1.2(d) and Comment [9] already authorize "advice", as does Rule 8.4 comment [1] ("Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.").

The proposed amendment crosses the line, however, when it lets the lawyer originate, design and control deception, by using the phrases "direct" and "supervise." Allowing lawyers to direct dishonest behavior of intermediaries (which lawyers cannot do directly) cuts too close to the bone.

There are any number of factual scenarios in which the proposed Rule change would allow a lawyer, through his non-lawyer designee, to mislead. For instance, it would be possible for a defense attorney to direct her investigator to lead a prosecution witness to believe she works for the prosecution in order to obtain an interview. Nothing would prevent an attorney from devising a sting operation to be implemented by others in order to catch an adverse witness in a compromising situation. Similarly, it would no longer be unethical for a prosecutor to tell his victim/witness coordinator to pass false information to a victim/witness, which, depending on the circumstances, could be advantageous to the prosecution's case. One can easily imagine a situation in which a prosecution witness is hesitant to testify and the prosecutor directs his staff to convey false, yet damaging, information in an attempt to persuade the witness to testify.

We can dispense with the notion that allowing a lawyer to supervise or assist others in lying ("dishonesty, fraud, deceit or misrepresentation") is somehow different from the lawyer lying. Any separation between the lawyer's duty of honesty and his or her duty to supervise, as embodied in rule 5.3, would have no practical consequence. With good reason the Restatement of the Law Governing Lawyers, §5, provides that "A lawyer is subject to professional discipline (2)... for attempting to commit a violation [of the applicable lawyer code], knowingly assisting or inducing another to do so, or knowingly doing so through the acts of another."

The Rule 21 petition claimed the Attorney General had a compelling need for relief from the current 8.4(c). This is incorrect since the "need" asserted falls well short of the need advocated in *In re Pautler*, 47 P.3d 1175 (Colo. 2002)("Purposeful deception by an attorney licensed in our state is intolerable, even when it is undertaken as a part of attempting to secure

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the surrender of a murder suspect") and also because, like District Attorneys, the AG can ethically work with traditional law enforcement - police, sheriffs, the Department of Public Safety's Bureau of Investigation (CBI), and other local, state and federal agencies, as long as the AG does not supervise the investigation. This model is used throughout the state daily. The AG claims it is unable to outsource its investigations; if this is so, this complaint should be directed to the General Assembly for a legislative change. Even under current law, the CBI can assist the Attorney General in criminal investigations, see C.R.S. §24-33.5-412(1)(a). The AG's petition also asserts "investigators in the Office use undercover techniques only rarely," p.24. Therefore, there is no compelling need to abandon the longstanding requirement that lawyers and their supervisees be truthful.

The Rule 21 petition sought to distinguish between lying with a pure motive and doing so for an evil purpose. "Thus, Rule 8.4(c) does not encompass every act that could, in the abstract, be described as 'dishonesty.' Instead, it includes only the type of conduct that, like fraud or deceit, implicates a lawyer's moral integrity: for example, conduct designed to cheat another person to gain a personal benefit." [citations omitted] Petition, p.29. Yet *Pautler, supra,* squarely rejected this distinction when it held Pautler's motive relevant only to the sanction to be imposed.

This court has at least twice considered dishonesty by the prosecuting attorney and condemned it. In *Pautler*, the court rejected a claim that a Deputy District's attorney's dishonesty - deliberately impersonating a public defender - was justified by the need to apprehend a murder suspect. "Lawyers serve our system of justice, and if lawyers are dishonest, then there is a perception that the system, too, must be dishonest." *Pautler* at 1179. *Pautler*, in turn, relied upon *People v. Reichman*, 819 P.2d 1035 (Colo. 1991), in which the district attorney filed a phony criminal case as part of an undercover sting. (The criminal case against the lawyer whom Reichman targeted was dismissed because the prosecution's conduct was "outrageous." *People v. Auld*, 815 P.2d 956, (Colo. Ct. App. 1991).

> District attorneys in Colorado owe a very high duty to the public because they are governmental officials holding constitutionally created offices. This court has spoken out strongly against misconduct by public officials who are lawyers. The respondent's responsibility to enforce the laws in his judicial district grants him no license to ignore those laws or the Code of Professional Responsibility.

Reichman at 1038-39, as quoted in *Paulter* at 1180.

Certainly, as the State's chief legal official, the AG should be held to the same standard as district attorneys.

Members of CCDB are proud of what they do and how they do it. Our job is an honor and a privilege. The last thing we seek is the ability - or the duty - to be dishonest. Colorado has long recognized the importance of candor to the tribunal in the context of a criminal trial,

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People. v. Schultheis, 638 P.2d 8 (Colo. 1981). There is little, if any, justification for allowing lawyers to be less candid to each other, to witnesses, and to the public at large.

The breadth of this philosophical change embodied in the new rule is so great that it would necessitate a change in the oath we all must take in our profession:

I DO SOLEMNLY SWEAR...

> I will support the Constitution of the United States and the Constitution of the State of Colorado; I will maintain the respect due to Courts and judicial officers; I will employ only such means as are consistent with *truth and honor*; I will treat all persons whom I encounter through my practice of law with *fairness*, courtesy, respect and *honesty*; I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

Colorado Attorney Oath of Admission (emphasis added), found at http://www.coloradosupremecourt.com/Current%20Lawyers/Oath.asp.

The policies behind *Reichman* and *Pautler* are as correct and important today as when those cases were decided, and changing them without good reason seems imprudent. In the final analysis, the lesson of *Pautler*, *Reichman* and common sense is that deceit in the name of virtue remains deceitful. Our members want no part of it, nor should other lawyers be allowed to do it.

Kathleen McGuire, President
Colorado Criminal Defense Bar

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September 5, 2017

Honorable Chief Justice Nancy Rice and the
Honorable Justices of the Colorado Supreme Court
2 East 14th Ave.
Denver, CO 80203

RE: Proposed Rule Change to RPC 8.4(c)

Dear Chief Justice Rice and Justices:

On behalf of Colorado's elected District Attorneys, the Colorado District Attorney's Council submits this letter in support of the proposed change to RPC 8.4(c).

Undercover investigations have "long been acknowledged" as a necessary part of law enforcement. *Lewis v. United States*, 385 U.S. 206, 208-09 (1966). Because such investigations present special issues of both law and policy, prosecutors have traditionally guided or supervised undercover operations. And the legal community has traditionally regarded such guidance as a part of a prosecutor's duties. *See* ABA Criminal Justice Standard 3-2.7(a) ("The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.").

Recently, however, the Office of Attorney Regulation has adopted a view that conflicts with that traditional view. The ARC has taken the position that RPC 8.4(c) prohibits any DA's investigator from engaging in undercover investigations, on the ground that such investigations use deception.

Consequently, DA's offices and other law enforcement agencies have ceased to participate in undercover investigations. Additionally, DAs have declined to consult with police who seek advice in planning or carrying out undercover investigations, out of fear that the ARC would view such advice as an impermissible form of assistance in violation of RPC 8.4(a). Although such actions are necessary in light of the ARC's position, they inevitably will degrade the quality and integrity of undercover operations and will impair public safety.

The proposed change to RPC 8.4(c) is both timely and critical in light of the current public perception and criticisms of law enforcement activity. At no time in recent history has there been a more pressing need for law enforcement officers to avail themselves of objective, thoughtful, and well-reasoned legal advice when

contemplating the use of undercover investigations. Such investigations raise a number of potentially problematic issues, such as entrapment. *E.g. Patterson v. People,* 168 Colo. 417, 420, 451 P.2d 445, 446 (1969). Or outrageous governmental conduct. *People v. Esch*, 786 P.2d 462, 466 (Colo. App. 1989). Or other claims of deprivation of constitutional rights. *Osborne v. Howard*, 844 F. Supp. 511, 512 (E.D. Ark. 1994). Additionally, prosecutions based on undercover investigations can result in claims that the evidence presented is not sufficient to convict. *E.g. People v. Douglas*, 2012 COA 57, ¶ 33, 296 P.3d 234, 244; *People v. Vecellio*, 2012 COA 40, ¶ 10, 292 P.3d 1004, 1009. Police can, and should, consult with prosecutors and civil legal counsel with respect to such issues while planning undercover operations. The proposed rule change to RPC 8.4(c) serves the public interest by providing a necessary and objective layer of legal oversight and guidance for law enforcement in the complicated interplay between innovative and effective investigative techniques and the protection of the constitutional rights of those under investigation.

The District Attorneys and CDAC sincerely thank the Supreme Court for recognizing and seeking a workable solution to the current dilemma resulting from the ARC's interpretation and application of RPC 8.4(c). We believe that the proposed change to RPC 8.4(c) addresses the many legal complexities inherent in significant criminal investigations. Providing this exception will further serve the public interest and perhaps the public perception of the work done by law enforcement by providing for the ability of law enforcement to actively seek out the expert legal advice and the constitutional scrutiny of proposed investigations by prosecutors. Prosecutors will benefit from this rule change by acquiring the ethical authority to review investigative methods and procedures, counsel law enforcement on these issues, protect the constitutional rights of those being investigated, and effectively build strong cases that ultimately result in enhancing public safety through constitutionally sound prosecutions. For these reasons, Colorado's District Attorneys and CDAC support the proposed rule change to RPC 8.4(c) and urge its immediate adoption by the Colorado Supreme Court.

Respectfully Submitted,

Jeff Chostner
President, CDAC
District Attorney, 10th JD

Thomas R. Raynes
Executive Director, CDAC

County Sheriffs of Colorado

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RE: Proposed Amendment to Colo. RPC 8.4(c)

Dear Chief Justice Rice and Members of the Court:

The County Sheriffs of Colorado want to thank you for the opportunity to submit comments in response to your proposed amendment to Colorado Rule of Professional Conduct 8.4(c). The County Sheriffs of Colorado strongly support the proposal. Undercover operations are a vital tool to law enforcement investigations, and the advice and counsel of government lawyers are equally important in ensuring that both criminal and civil enforcement actions conform to the letter and spirit of the law. The proposed amendment, if adopted, will ensure that the Professional Rules are not misapplied, and yet still allow the vigorous and lawful pursuit of justice.

As many cases throughout the years have proven time-and-again, undercover and other covert investigations are accepted, and critical, tools for law enforcement officers trying to reveal criminal conspiracies that are often difficult to detect. Drug smuggling conspiracies, prostitution rings, human trafficking, and a myriad of other crimes necessitate the need for undercover and covert means of detection. Due to the complexities of these cases, the advice of government attorneys is critical in helping to prevent the unnecessary intrusions or invasions into personal privacy; entrapment of otherwise innocent persons; interference with privileged or confidential communications; interference with or intrusion upon constitutionally protected rights; and agent involvement in illegal conduct that would be considered offensive to public values and may adversely impact a jury's view of a case.

By adopting the proposed amendment attorneys and law enforcement can work together to meet the dual purposes of what is in the best interest of the public. Ensuring that covert investigations are conducted lawfully, and that the rights of victims and the suspects are honored. The County Sheriffs of Colorado respectfully urge the Court to adopt its proposed amendment to Colo. RPC 8.4(c).

Sincerely,

Sheriff Justin Smith, Larimer County
Sheriff Chad Day, Yuma County
Sheriff Shayne Heap, Elbert County
Sheriff Garrett Wiggins, Routt County
Sheriff Michael McIntosh, Adams County
Sheriff Tony Spurlock, Douglas County
Sheriff Joe DiSalvo, Pitkin County
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Staff Attorney
Jonathan P. White

September 5, 2017

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed rule change to Colo. RPC 8.4(c), for conduct involving covert activities

Dear Chief Justice Rice and other members of the Court:

On June 5, 2017, the Court posted a proposed rule change involving Colo. RPC 8.4. That proposal would add an additional clause to the language of Colo. RPC 8.4(c), as follows:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities; . . . .

A 2012 supplemental report issued by the Pretexting Subcommittee of the Standing Committee on the Rules of Professional Conduct first suggested this proposal. On July 13, 2012, the full Standing Committee reviewed this proposal.

The Standing Committee voted against recommending this proposal or any other rule change to the Court. The reasons for each member's vote at the time varied, with no consensus on how to handle this issue. However, the Standing

Committee voted to provide its work product on this issue to the Court, which it did in November 2012. The Court took no action regarding the proposal at that time.

The issue remained dormant for the next few years. In 2017, the Office of the Colorado Attorney General filed a Rule 21 Petition with this Court. That petition requested that this Court construe Colo. RPC 5.3 and Colo. RPC 8.4(c) not to implicate a government lawyer's supervision of, or advice regarding, undercover law enforcement investigations, and to enjoin the undersigned's office from enforcing those two rules against government lawyers who supervise or advise law enforcement agencies in such operations. The Rule 21 Petition was based on concerns raised by the Attorney General's understanding of this office's dismissal of a confidential investigation involving another public official.

On June 5, 2017, the Court dismissed the Rule 21 Petition. On that same day, the Court posted the above proposal for comment and hearing. Comments are due September 5, 2017. A public hearing on this proposal is scheduled for September 14, 2017.

The undersigned's office opposes any change to Colo. RPC 8.4(c). This office believes the proposal will disrupt and uproot well-settled interpretations of Colo. RPC 8.4(c), which, in its present form, provides clear and unambiguous guidance to lawyers and the public regarding a lawyer's duty of honesty. The proposal is also ambiguous and sends a contradictory message to lawyers and the public that, in some instances, lawyers can use others in their stead to engage in dishonest conduct that the lawyer would otherwise be precluded from doing.

This office instead recommends that, should the Court agree a change is needed, the Court adopt comments to Colo. RPC 1.2 and Colo. RPC 5.3 to address the very limited issue of government lawyers who are sometimes faced with conflicting mandates imposed by the Rules of Professional Conduct and other law.

I. Introduction

The undersigned separates his office's position regarding the underlying basis for the proposed rule change into two categories of lawyers:

1) The first category involves government lawyers who are faced with conflicting mandates under the law. For this category, the undersigned appreciates the immediate concern raised by the Attorney General in her

Rule 21 Petition. The undersigned believes there is a solution that can be addressed in the Colorado Rules of Professional Conduct through comments to Colo. RPC 1.2 and Colo. RPC 5.3 that give interpretive guidance to government lawyers who are confronted with such conflict in these limited circumstances, and to the undersigned's office for enforcement purposes.

2) The second category involves all other Colorado lawyers who do not face such a conflicting mandate under the law. For this category of lawyers, the undersigned's office believes the answer is simple: there are solid grounds for why this Court should not alter the Colorado Rules of Professional Conduct for conduct by lawyers who fit into this category.

Government lawyers with conflicting mandates. The undersigned's office recognizes the difficult conflict that may exist for government lawyers who serve in two roles: as officers of this Court, and as members of law enforcement agencies charged with specific public safety or consumer protection duties. Each role may involve specific mandates from different sources, including the constitution, statutes, court rules, and other sources. The specific responsibilities assigned to a law enforcement agency, charged with public safety or consumer protection issues, may be in conflict with the responsibilities imposed by this Court's Rules of Professional Conduct. Unless each mandate can be reconciled, the Court may wish to recognize and address such potential conflict in a way that does not harm the underlying purpose of the Colorado Rules of Professional Conduct.

These public service lawyers and this office would appreciate any guidance the Court can give on this issue. The undersigned believes this guidance can best be provided in a comment rather than a rule. The comment should be placed with Colo. RPC 1.2 (involving "advice" to other law enforcement agencies), and Colo. RPC 5.3 (involving supervision of nonlawyers employed or retained by the lawyer); and, only if necessary, with Colo. RPC 8.4 (involving any need for the lawyer to engage in dishonest conduct). If the Court believes any of these conflicts needs to be addressed by Court rule rather than in comments, the undersigned urges that this guidance occur in a manner other than the inclusion of specific language in Colo. RPC 8.4(c).

All other situations. If there are no conflicting mandates under the law, then the current Colorado Rules of Professional Conduct promote the public interest as set forth in the Preamble to the Rules Governing the Practice of Law and the Preamble and Scope to the Colorado Rules of Professional Conduct. There should

be no exception to the duty of honesty for a lawyer engaged in the practice of law, particularly when there is no conflicting mandate. At a minimum, the Court should refrain from making a decision on conduct involving this category of lawyers and circumstances until further study is done on the effects of such a major shift on a lawyer's duty of honesty. The ABA Center for Professional Responsibility (ABA Center) provides national guidance and leadership on model ethics standards and lawyer regulation through the ABA Model Rules of Professional Conduct and ABA Model Rules of Disciplinary Enforcement Standards. ABA Center staff for the Standing Committee on Ethics and Professional Responsibility[1] and for the Standing Committee on Professional Discipline have been alerted to this matter, and may follow up with their respective chairs on how these committees might provide national guidance and leadership on these issues.

II. Background

A. The Court.

The Colorado Supreme Court has the exclusive authority to regulate and control the practice of law in Colorado.[2] This authority extends to rule-making authority.[3] Pursuant to this power, the Court has adopted the Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, which establish the procedures for the attorney regulation system, including the undersigned's office.[4] The Court has also adopted the Colorado Rules of Professional Conduct, which provide the standards of conduct for Colorado attorneys.[5] These Rules of Professional Conduct apply to all lawyers who practice law in Colorado, whether licensed or otherwise authorized to practice law here.[6]

B. The Rules.

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[1] Since 1908, the ABA Standing Committee on Ethics and Professional Responsibility has focused its efforts on the development of model national ethics standards for lawyers and the judiciary and the drafting of ABA Formal Ethics Opinions interpreting and applying those standards. This committee was responsible for the seven-year project that resulted in the creation of the ABA *Model Rules of Professional Conduct*, completed in 1992. This committee has also overseen all amendments to the ABA Model Rules since 1993.

[2] Colo. Const. Art. VI; *Smith v. Mullarkey*, 121 P.3d 890, 891 (Colo. 2005).

[3] *Id.*

[4] *See* C.R.C.P. 251.1, *et seq.*

[5] Appendix to Chapters 18 to 20, the Colorado Rules of Professional Conduct.

[6] C.R.C.P. 251.1(b).

The primary purpose for regulating the practice of law in Colorado is promotion of the public interest,[7] which includes protection of the public.[8] A Colorado lawyer's record of conduct should be one that justifies the trust of clients, adversaries, courts, and others with respect to the professional responsibilities owed to them. The Rules of Professional Conduct codify these professional responsibilities.[9] These professional responsibilities include competence, diligence, trustworthiness, reliability, **honesty**, **integrity**, and judgment.

The Colorado Rules of Professional Conduct were adopted by this Court in May 1992, effective January 1, 1993.[10] These rules were based on the ABA Model Rules of Professional Conduct. The ABA and Colorado Rules of Professional Conduct were a significant departure in structure from the previously-applied Code of Professional Responsibility, with its canons, disciplinary rules, and ethical considerations.

The Rules of Professional Conduct are rules of reason.[11] Unfortunately, the Rules of Professional Conduct do not always give a lawyer a clear or satisfying answer to every ethical quandary. Each legal situation is nuanced by unlimited circumstances that cannot be easily quantified or qualified. Comments accompanying each rule can explain and illustrate the meaning and purpose of the rule,[12] particularly in matters of import.[13] These Comments guide interpretation of the rule, but the text of each rule is authoritative.[14] Lawyers ultimately must exercise their own professional judgment in the application of these rules.

Lawyers may have a different interpretation of a particular rule than the undersigned's office. This interpretation can be explored and analyzed by ethics

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[7] *See* Preamble to Chapters 18 to 20, the Rules Governing the Practice of Law in Colorado.
[8] *People v. Goldstein*, 887 P.2d 634, 643-44 (Colo. 1994) (citing *People v. Grenemyer*, 745 P.2d 1027, 1029 (Colo. 1987)).
[9] Colo. RPC, pmbl., ¶ 7.
[10] *See* C.R.C.P. 251.1(c).
[11] Colo. RPC, Scope, ¶ 14.
[12] Colo. RPC, Scope, ¶ 21.
[13] *See, e.g.,* Comment 14 to Colo. RPC 1.2 (adopted in March 2014).
[14] Colo. RPC, Scope, ¶ 21.

opinions,[15] with the undersigned's office during an investigation,[16] or through review by the Attorney Regulation Committee,[17] the Presiding Disciplinary Judge,[18] a hearing board,[19] or on appeal with this Court.[20]

The ABA Model Rules and Colorado Rules contain eight separate sections. There are four sections relevant to this discussion:

- Conduct involving "advice" or "assistance" to a client falls within the *Client-Lawyer Relationship* section of the rules, and particularly Colo. RPC 1.2 (*Scope of Representation and Allocation of Authority Between Client and Lawyer*);

- Conduct involving the lawyer's honesty in statements to others in a legal transaction falls within the *Transactions with Persons Other Than Clients* section of the rules, and particularly Colo. RPC 4.1 (*Truthfulness in Statements to Others*);

- Conduct involving supervision of an employee in a government lawyer's law office falls within the *Law Firm and Association* section of the rules, and particularly Colo. RPC 5.3 (*Responsibilities Regarding Nonlawyer Assistants*); and

- Conduct involving the lawyer's general duty of honesty and candor falls within the *Maintaining the Integrity of the Profession* section of the rules, and particularly Colo. RPC 8.4 (*General Misconduct).*

In situations involving covert or deceitful activity (sometimes referred to as "pretexting"), some Court guidance by comments to at least two of the above rules may be necessary in order to address the nuances raised by: 1) a lawyer's advice or direction to clients, and 2) supervision of, or direction to, law office employees. But the method in which this limited issue is addressed in each of these sections should not undermine or overshadow each of the above general rules.

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[15] While not binding on this office, this office carefully considers the analysis set forth in CBA and ABA formal ethics opinions.
[16] C.R.C.P. 251.9-.10.
[17] C.R.C.P. 251.12.
[18] C.R.C.P. 251.16.
[19] C.R.C.P. 251.17-.19.
[20] C.R.C.P. 251.27.

III. Whatever the Court Decides Regarding the Need to Change the Rules of Professional Conduct, the Undersigned Urges This Court Not to Disrupt or Uproot Colo. RPC 8.4(c), the Rule's General Prohibition Against Dishonesty, and the Case Law Interpreting This Critical Rule.

Even though the adoption of the Rules of Professional Conduct as a whole was a significant departure from the previous Code of Professional Responsibility, Colo. RPC 8.4(c)'s prohibition against all lawyers engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation" remained exactly the same as its predecessor rule, DR 1-102(A)(4), adopted by this Court in the early 1970s.[21] This duty of candor and honesty, required of all Colorado lawyers, traces back to, and predates, the 1908 Canons of Ethics.[22]

Colo. RPC 8.4(c) is a cornerstone rule in the Colorado Rules of Professional Conduct. It codifies the duty of honesty that lawyers owe to clients, the courts, and others. This rule makes clear to all that lawyers must be honest in their general dealings with others. After all, our Oath of Admission already requires honesty in the practice of law and hopefully will not now need an exception.[23] This Court's policy mandates that attorneys "observe the highest standards of professional conduct." C.R.C.P. 251.1(a). As the Court stated in *In re DeRose*, 55 P.3d 126, 131 (Colo. 2002):

> Attorneys must adhere to high moral and ethical standards. Truthfulness, honesty, and candor are core values of the legal profession. *In re Pautler*, 47 P.3d 1175, 1178-79 (Colo. 2002). Lawyers serve our system of justice as officers of the court, and if lawyers are dishonest, then there is a perception that the system must also be dishonest. *Id.* at 1179. Attorney misconduct perpetuates the public's misperception of the legal profession and breaches the public and professional trust. *Id.* at 1183.

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[21] *See* Colo. Code of Prof. Resp., DR 1-102(A)(4) (effective August 20, 1970).

[22] *See, e.g.,* 1908 ABA Canons of Ethics 22 (Duty of Candor and Fairness) and 29 (Upholding the Honor of the Profession).

[23] The Colorado Oath of Admission provides in part: "...I will employ only such means as are consistent with truth and honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty . . . ."

The undersigned's office relies heavily on Colo. RPC 8.4(c) and the case law interpreting the same in a significant number of serious lawyer misconduct cases, because dishonesty in handling client funds, or dishonesty to a court or to a client, or in the conduct of other affairs, often strikes at the very heart of the legal profession. There is substantial case law that interprets this important rule and its predecessor. For example, in *People v. Finesilver*, 826 P.2d 1256, 1258 (Colo. 1992), this Court stated:

> Thievery and deception on the part of a lawyer corrupt and betray the relationships between lawyer and client and between the legal profession and the public. Thus, disbarment of the dishonest lawyer is usually appropriate. *People v. Margolin,* 820 P.2d 347, 349 (Colo. 1991); *see also People v. Whitcomb,* 819 P.2d 493 (Colo. 1991) (conversion of trust funds warrants disbarment); *People v. Kramer,* 819 P.2d 77 (Colo. 1991) (lawyer disbarred for obtaining loans by means of false and fictitious "investment plans"); *People v. Mulligan,* 817 P.2d 1028 (Colo. 1991) (attorney disbarred for conversion of client funds); *People v. Calt,* 817 P.2d 969 (Colo. 1991) (assisting client in fraudulent scheme to obtain funds from the client's employer warrants disbarment of the lawyer); *People v. Grossenbach,* 814 P.2d 810 (Colo. 1991) (conversion of client funds and knowing deception of clients warrants disbarment).

Even a slight modification of Colo. RPC 8.4(c) would likely spur considerable litigation regarding how the modification alters this substantial case law. The Court and its regulatory offices will have to address new defenses and interpretations made as a result of such new language.

The proposal now before the Court attempts to address a very limited issue that is tangential, at best, to the long-established principle that lawyers must be honest. If there is a way to give guidance to this office and to government practitioners who have conflicting mandates, in a manner that does not disturb the text of Colo. RPC 8.4(c), the undersigned urges this Court to consider such alternative.

The undersigned encourages the Court to use a comment or two, explained below, to address the limited issue at hand rather than any rule change, particularly any change to Colo. RPC 8.4(c). Even if this Court deems that a change to Colo.

RPC 8.4 is necessary, a rule change as is used in Oregon, located within RPC 8.4 but not RPC 8.4(c), would be preferable.[24]

IV. Comments to Colo. RPC 1.2, 5.3, and Possibly 8.4 Are Sufficient to Address This Limited Issue.

The undersigned's office proposes that in lieu of a rule change, the Court consider adopting a comment to Colo. RPC 1.2 (on the issue of advising or assisting) and Colo. RPC 5.3 (on the issue of supervising non-lawyers) to address the concerns raised by the Attorney General. Only if the Court deems it necessary, should a general comment to Colo. RPC 8.4 on the issue of loosening the general prohibition against lawyer dishonesty in this limited circumstance be adopted. The adoption of comments to Colo. RPC 1.2 and Colo. RPC 5.3 is the least intrusive measure to give guidance to those government lawyers involved in law enforcement activities, and to this office in its enforcement activities.[25] The undersigned's office provides draft comments for these rules for the Court's consideration, attached as Appendices 1 and 2.

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[24] Oregon RPC 8.4(c) provides:

> (a) It is professional misconduct for a lawyer to:
>
> . . .
>
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
>
> . . .
>
> (b) 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. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when 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.

[25] Comments accompanying each rule should explain and illustrate the meaning and purpose of the rule. *See* Colo. RPC, Scope, paragraph 21. Comments are guides to interpretation of the rule. Comments have been used by this Court as an effective guide to the undersigned's office on enforcement issues, and to lawyers under specific circumstances. *See, e.g.,* Comment 14 to Colo. RPC 1.2, adopted by this Court in March 2014, concerning the conduct of lawyers who counsel their clients regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and assist clients in conduct the lawyer reasonably believes is permitted by Colorado law.

With respect to the proposal to adopt a comment to address this issue, the undersigned notes this was an effective approach to address the issue concerning Colorado lawyers' counsel and assistance to clients involved in the marijuana industry. The Court's adoption of Comment 14 to Colo. RPC 1.2 in March 2014 provided guidance to lawyers regarding a uniquely challenging situation without otherwise altering lawyers' professional obligations.

In the alternative, the undersigned's office suggests amending the text of Colo. RPC 1.2, involving advice to or counseling of clients, or assisting clients, and the text of Colo. RPC 5.3, involving direction or supervision of government law office employees. A final alternative is the method used by the Oregon Supreme Court, which amended the general text of RPC 8.4, but not specifically the text of 8.4(c).

V. The Proposed Rule Change to RPC 8.4(c), as Written, Presents Additional Issues

A. The Proposed Rule Change Is Not Clear, Concise, Unambiguous, and Consistent with Other Rules.

Supreme Court rules should be clear, concise, unambiguous and consistent with all other Rules of Professional Conduct. The proposal now before the Court fails in all of these respects. If adopted, this proposed new rule will create significant uncertainty about what a Colorado lawyer can and cannot do, and will make disciplinary enforcement of Colo. RPC 8.4(c) difficult. When reviewing the wording of the proposed rule, the reader must construe the language just as it reads, giving the words their ordinary and usually accepted meaning. The proposal does not clarify whether, or how, it modifies any of the current language of Colo. RPC 8.4(c). The proposed new rule has two clauses:

i) The first clause is the current, general prohibition against dishonest conduct:

It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

ii) The second clause is apparently intended to be an exception to the first clause:

> . . . *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;* . . . .

A simple interpretation of the proposed new clause for Colo. RPC 8.4(c) is that this new clause does not change the current prohibition against lawyer dishonesty in any way. It would still be professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Thus, the additional clause does not alter the candor requirement contained in the first clause. Instead, the additional clause alters a lawyer's duties when assisting, directing, or supervising others who may be employed by the lawyer or retained or associated with the lawyer. The duties associated with advising a client can be found in Colo. RPC 1.2. The duties associated with supervising or directing another associated with the lawyer can be found in Colo. RPC 5.3. These two rules are more appropriate for a comment or rule change than Colo. RPC 8.4.

Additionally, it is unclear whether the second clause creates any exception to the first clause. It seems incomplete and unrelated to the first clause. Under the plain meaning of its wording, there remains no exception to the prohibition that lawyers themselves cannot engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Also unclear is whether the second clause allows the lawyer to direct or supervise others to engage in dishonesty; if it is intended to allow lawyers to direct others to engage in dishonesty or supervise others engaged in dishonest conduct, the rule should state so.

This proposal fails to create any exception under its plain meaning. The second clause is only a vague assertion that a lawyer may advise, direct, or supervise others who participate in lawful investigative activities. If one adds language to create an actual exception, such as:

> *It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that a lawyer may do so when advising, directing, or supervising others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;* . . . .

then the exception swallows the general prohibition against lawyer dishonesty, and now allows the lawyer to engage in dishonest conduct directly and through the acts of another. *But see* Colo. RPC 8.4(a): "It is professional misconduct for a lawyer to violate or attempt to violate the Rules . . . through the act of another."

If only intended to allow lawyers to advise, direct, or supervise others to engage in dishonesty, one could say:

> *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, or investigators, who participate in lawful investigative activities, to engage in dishonest conduct.*

But again, *see* Colo. RPC 8.4(a): "It is professional misconduct for a lawyer to violate or attempt to violate the Rules . . . through the act of another."

Accordingly, even with possible additional language to help clarify the intent of the proposed language, such clarifying language only underscores that the proposal conflicts with a lawyer's professional obligations as set forth throughout the Rules of Professional Conduct.

B. Terms Used in The Proposed Rule Need Definition.

Terms used in the proposed rule are ambiguous and will require considerable, fact-specific litigation to determine the exact parameters of what it means to "advise, direct or supervise" others without violating the rule.

Advise, Direct, or Supervise. This phrase is ambiguous. First, it is unclear whether "advise, direct, or supervise" permits direct participation in undercover activities by the lawyer. The plain meaning of these terms would suggest not; however, it is not clear. Additional questions this language raises include whether the lawyer may permit others to lie to the subject of the investigation in the lawyer's presence, to what extent the lawyer may "direct" covert activities, whether the lawyer may initiate the covert activities, and whether and to what extent to a lawyer may participate in planning and execution of the covert activities. Importantly, the language does not address when supervision becomes participation.

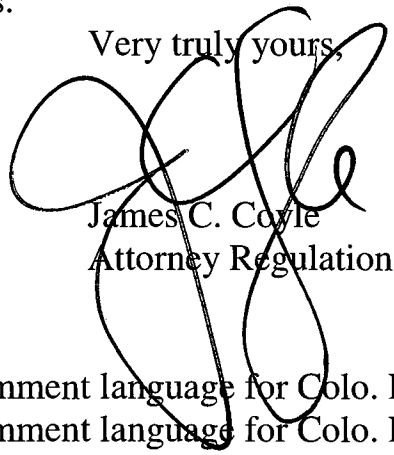
Others. It is similarly unclear who the lawyer can advise, direct, or supervise. The plain language of the proposal allows the lawyer to "advise, direct, or supervise" any individual other than the lawyer in an investigation. The words "including clients, law enforcement officers, and investigators," do not limit this assistance to only these types of individuals and thus provide little value by their inclusion in this rule. If the lawyer is in fact allowed to "advise, direct, or supervise" *any* other individual other than the lawyer, the rule should clearly state that. A preferred requirement would be that the lawyer only be allowed to advise, direct, or supervise Colorado P.O.S.T. certified, or federal certified, investigators and inspectors.

Lawful Investigations. The proposed rule provides no guidance on what a lawful investigation might be. This office will be required to make a very fact-intensive analysis whenever a lawyer raises a defense that the lawyer was only assisting, directing, or supervising others in a lawful investigation. Again, the unintended consequences of a vague and ambiguous exception to the duty of honesty will make enforcement of this rule difficult in the future.

VI. Conclusion

The Court should only address the immediate concerns raised by the Attorney General. The Court can best address these concerns by adopting comments rather than rule changes. The undersigned proposes that the Court address this limited issue through the addition of comments to Colo. RPC 1.2 and Colo. RPC 5.3 rather than adopting the proposed change to Colo. RPC 8.4(c). This approach allows for much-needed guidance on this issue, while maintaining the Court's long-held, unambiguous position regarding a lawyer's duty of honesty. All other issues raised by those other than in law enforcement should be addressed through a careful ABA study focused on the model rules.

Very truly yours,



James C. Coyle
Attorney Regulation Counsel

JCC/cl

Appendix 1 – Proposed draft comment language for Colo. RPC 1.2
Appendix 2 – Proposed draft comment language for Colo. RPC 5.3

Appendix 1

RPC 1.2 Comments

[15] Law enforcement agents are authorized under certain circumstances to use appropriate artifice and deception to ferret out illegal activities. *People in Interest of M.N.*, 761 P.2d 1124, 1130 (Colo. 1988) (quoting *United States v. Szycher*, 585 F.2d 443, 449 (10th Cir. 1978)). Lawyers may advise law enforcement agents on the legality and appropriateness of such government conduct.

Appendix 2

Proposed Comment [5] to Colo. RPC 5.3 regarding government attorneys under the heading "Government Non-Lawyer Investigators";

A difficult conflict may exist for government lawyers who serve two roles: as officers of the Court and as members of government law enforcement agencies assigned with specific public safety or consumer protection duties. Recognizing that federal and state law may require employees of such government agencies to engage in covert or deceptive activities to fulfill their mandate to protect the public, lawyers retained by or associated with such government agencies are authorized to supervise employees of such agencies in the engagement of covert or deceptive activities. This exception to the authorized scope of representation involving government agencies does not otherwise modify or excuse government lawyers' general honesty obligations under Colo. RPC 8.4(c) in any other way. Such government lawyers are required to maintain their individual integrity and not directly or personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

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September 5, 2017

By email to cheryl.stevens@judicial.state.co.us
Cheryl Stevens
Chief Deputy Clerk
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

RE: Proposed change to Rule 8.4(c) of the Colorado Rules of Professional Conduct.

Dear Ms. Stevens:

I am the Co-Executive Director of the Civil Rights Education and Enforcement Center (CREEC), a Denver-based civil rights nonprofit. I am also an attorney licensed to practice in Colorado (Bar No. 25890). CREEC submits this letter on behalf of itself as well as the Colorado Cross-Disability Coalition (CCDC), a statewide disability rights organization, and the Denver Metro Fair Housing Center (DMFHC), a metro-area fair housing organization.

These organizations strongly support the proposed changes to Colorado Rule of Professional Conduct ("CRPC") 8.4(c) adding the underscored language to the Rule:

> It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.

In this letter, we explain both why undercover "testing" is essential to investigating illegal discrimination and why it is important that attorneys be permitted to guide and advise investigators in conducting such tests. While this letter provides an overview and some relevant examples, we respectfully urge the Court to review the seminal law journal article on this subject, which provides a much more thorough discussion and whose conclusions we adopt: David B. Isbell and Lucantonio N. 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 (1995).

"Testing" is essential to anti-discrimination enforcement

In this day and age, those who discriminate in violation of the law rarely do so publicly or obviously. While there was a time when signs reading "whites only" or "Irish need not apply" were openly displayed on apartments, at businesses, and in want-ads, since the passage of the Civil Rights Act of 1964 and the Fair Housing Act of 1968, discrimination is rarely announced in such an obvious fashion.

Instead, for example, African-American, Latinx, or other protected-class home-seekers will hear that an apartment was *just* rented, and is now unavailable. Female or other protected-class job-seekers will simply never hear back from prospective employers after submitting an application. People of color attempting to make a purchase by check are informed of a "no-checks" policy. Standing alone, it is very difficult to know whether such responses are legitimate, or represent illegal housing, employment, or public accommodations discrimination.

For this reason, starting in the fair housing arena, civil rights organizations have used "paired testing" as an investigative device. Classically, paired testing involved sending a black tester and a white tester to an apartment complex advertising a unit for rent. The black tester would go first, approaching the management office to ask about availability. If they were told that no apartment was available, a white tester would follow soon after. If the white tester was told that the apartment was available, the test would have revealed and substantiated a fair housing violation far more accurately and reliably than the simple "not available" to the black tester would have.

This type of fair housing testing has been endorsed by the Supreme Court. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (holding that black tester had standing to challenge misinformation concerning availability of housing). As the Seventh Circuit has explained,

> 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. The evidence provided by testers both benefits unbiased landlords by quickly dispelling false claims of discrimination and is a major resource in society's continuing struggle to eliminate the subtle but deadly poison of racial discrimination.

Richardson v. Howard, 712 F.2d 319, 321 (7th Cir. 1983); *see also Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("It would be difficult indeed to prove discrimination in housing without this means of gathering evidence.").

Testing has since expanded beyond race discrimination in housing, and now involves everything from disability testing[1] -- both physical access and discriminatory treatment -- to employment testing.[2] The United States Department of Housing and Urban Development offers funding to organizations to, among other things, "conduct preliminary investigation of claims, including sending 'testers' to properties suspected of practicing housing discrimination."[3] The United States Equal Employment Opportunity Commission has endorsed the activities of employment testers, which it defines as "persons who apply for employment for the purpose of testing for discriminatory hiring practices, but do not intend to accept such employment."[4]

Some anti-discrimination testing can be accomplished without misrepresentation or deception. For example, testing for physical accessibility under the Americans with Disabilities Act often simply requires a customer to bring a tape measure. Employment testing, at the other extreme, can involve a sophisticated system of fake resumes and fake references with fake phone numbers. Indeed, in one of the landmark

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[1] *See, e.g., Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014) (disabled shopper had standing to test for accessibility); *Tandy v. City of Wichita*, 380 F.3d 1277, 1287-88 (10th Cir. 2004) (disabled bus rider had standing to test accessibility of the system); *Smith v. Pac. Props. and Dev. Corp.,* 358 F.3d 1097, 1103-04 (9th Cir. 2004) (disabled tester had standing under Fair Housing Act).

[2] *See Kyles v. J.K. Guardian Sec. Servs, Inc.*, 222 F.3d 289, 299 (7th Cir. 2000) (black employment tester had standing).

[3] "What is the Fair Housing Initiatives Program (FHIP)?" https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHIP.

[4] EEOC Notice No. 915.002 (May 22, 1996), https://www.eeoc.gov/policy/docs/testers.html.

studies of employment testing, researchers created similar resumes for individuals with names that sounded stereotypically black or white and sent them in response to help-wanted ads in Chicago and Boston. The results showed that the fake resumes with white-sounding names received 50% more callbacks for interviews.[5]

To be valid, a paired test must use testers who are similar save the characteristic that is being tested. For example, when a fair housing organization conducts paired housing tests for race discrimination, it will use testers of the same gender and age, instruct them to dress similarly, and provide them with similar "back stories," thus eliminating any explanation except race if they are treated differently. As noted above, paired employment tests require similar fake resumes. Ultimately, there are a number of types of anti-discrimination testing that require at least implied if not explicit deception, and that thereby reveal discrimination that could not otherwise be uncovered:

- Testing for discrimination in mortgage lending, which requires testers to misrepresent their financial status and interest in the loan in order to uncover race, gender, or maternity discrimination.

- Testing for discrimination against deaf home-seekers by landlords and developers unwilling to accept relay calls.

- Testing newly-constructed multifamily housing for wheelchair access, which requires testers to profess interest in units they are not interested in and -- if not themselves disabled -- describe a potentially non-existent disabled family member in order to conduct a survey.

- Testing for racial steering by real estate agents, requiring paired black or Latinx and white testers to contact an agent expressing interest in housing to determine whether they are predictably "steered" to certain neighborhoods.

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[5] Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination," National Bureau of Economic Research Working Paper 9873 (July 2003), https://www.nber.org/papers/w9873.pdf; *see also* Neha Sahgal, "Study: Muslim job candidates may face discrimination in Republican states," Nov. 26, 2013); http://www.pewresearch.org/fact-tank/2013/11/26/study-muslim-job-candidates-may-face-discrimination-in-republican-states/; Alessandro Acquisti and Christina M. Fong, "An Experiment in Hiring Discrimination Via Online Social Networks" (July 17, 2015). Available at SSRN: http://ssrn.com/abstract=2031979 or http://dx.doi.org/10.2139/ssrn.2031979.

- Testing employers for their response to resumes that do and do not indicate disability.[6]

- Testing online lodging portals for disability discrimination by creating online profiles of people with four types of disabilities.[7]

- Testing of employers whose want ads express or suggest illegal discrimination, for example,[8]

    - "Christian Company Seeking Experienced Workers for Home Cleaning. ... Would you like to be part of a service company which seeks to glorify Jesus by the way we do our work and honor our customers?"

    - "Looking for male automotive technician that has drivability, diesel, and electrical experience."

    - "Warehouse Position ... Prefer female with fast hands."

It Is Useful For Lawyers to Advise and Supervise Testing

Testing that reveals evidence of discrimination can be put to a number of uses. As the studies cited above suggest, such tests can be the subject of academic study and publication. Civil rights organizations may publish the results of their tests in the mainstream press to call attention to the problems they uncovered.[9] Testing may also provide a basis for reaching

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[6] Mason Ameri *et al.*, "The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior," National Bureau of Economic Research Working Paper 21560 (Sept. 2015), https://www.nber.org/papers/w21560.pdf.

[7] Mason Ameri *et al.*, "No Room At The Inn? Disability Access in the New Sharing Economy," (May 2017), https://smlr.rutgers.edu/sites/default/files/documents/PressReleases/disability_access_in_sharing_economy.pdf.

[8] Each of these quotes was found in a job advertisement on Craigslist.

[9] *See, e.g.,* Denver Metro Fair Housing Center, "Access Denied: Report on Rental Housing Discrimination," (Feb. 2014), https://www.scribd.com/document/204969235/Access-Denied-Report-on-Rental-Housing-Discrimination; Melanie Asmar, "Undercover tests find housing discrimination against Latinos, blacks, families," Westword (Feb. 6, 2014), http://www.westword.com/news/undercover-tests-find-housing-discrimination-against-latinos-blacks-families-5907691; Heather Draper, "Study finds rampant discrimination in Colorado rental housing," Denver Business Journal (Feb. 5, 2014), https://www.bizjournals.com/denver/news/2014/02/05/study-finds-rampant-discrimination-in.html?page=all.

out to entities that discriminate and urging them to change their policies or increase access and opportunities.

Ultimately, though, when these avenues fail, testing may lead to litigation. The ability to use testing evidence in court depends on being able to establish standing -- for the testers and/or the organization that conducted the investigation -- and then to establish that the tests validly demonstrate that discrimination has occurred. While testing coordinators and other nonprofit staff members are skilled in conducting valid and reliable tests, if the potential for litigation is to remain open, it is essential that attorneys be able to advise how to ensure the testers have standing and the results are admissible.

In addition, testing can be an essential tool to investigate a case brought by a client who has encountered discrimination in the ordinary course, rather than as part of a proactive investigation. When a client comes to us describing a situation in which they suspect discrimination because they were turned away by a housing provider or treated poorly by a public accommodation, it is often difficult to ascertain -- in the absence of testing -- whether illegal discrimination has in fact occurred. Given the existing ambiguity concerning an attorney's role in testing, we have been unwilling to participate in such tests, and have turned down potentially meritorious cases as a result.

Were CRPC 8.4(c) to be amended as proposed, CREEC attorneys would be able to work with investigators within our organization and at nonprofits that do not have in-house legal staff to gather reliable evidence of discrimination that would otherwise be unavailable.

Naturally, all attorney-supervised testing will continue to be governed by other relevant rules, including -- crucially -- rules governing communications with a represented party. Thus, it would be improper for an attorney to continue to use testers to communicate with employees of an opposing party if those communications would be barred by CRPC 4.2.

As this Court is likely aware, a number of other jurisdictions have rules or interpretations that explicitly permit attorney misrepresentation in the service of legitimate investigations. *See, e.g,* Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 99-11 (1999); Iowa Rules of Prof'l Conduct, Rule 32:8.4, comment 6; North Carolina State Bar 2014 Formal Ethics Opinion 9 (July 17, 2015), Ohio Rules of Prof'l Conduct, Rule 8.4, comment 2A; Oregon DR 1-102(D); Wisconsin Rules of Prof'l Conduct for Attorneys, Rule 20:4.1(b), committee comment.

For the reasons set forth above, the organizations listed in the first paragraph of this letter respectfully request that this Court approve the proposed amendment to CRPC 8.4(c).

Respectfully submitted,

CIVIL RIGHTS EDUCATION
AND ENFORCEMENT CENTER

Amy Robertson

Before the
COLORADO SUPREME COURT
Denver, Colorado 80203

In the Matter of Rules Governing Professional Conduct, Rule 8.4

COMMENT OF THE FEDERAL TRADE COMMISSION

September 5, 2017

The Federal Trade Commission ("FTC" or "Commission") submits this comment in support of the Colorado Supreme Court's proposed revision to the state's Rules of Professional Conduct, which would clarify that it is not a violation of those Rules for an attorney to advise or supervise law enforcement officers and others engaged in lawful undercover activities.[1] The proposed revision, which is consistent with the approach taken by the majority of jurisdictions that have considered the issue, implicitly recognizes the importance of evidence collected through such methods and the attorney's responsibility to ensure its legality and integrity.

A. Federal Trade Commission's Interest and Expertise

The Commission, as the nation's primary consumer protection agency, is charged with stopping unfair and deceptive practices that harm consumers. The Commission is responsible for implementing and enforcing the Federal Trade Commission Act and other consumer protection statutes and regulations.[2] The Commission accomplishes its mission in many ways, including collecting consumer complaints, conducting investigations, and bringing law enforcement actions. One of the FTC's core missions is to combat fraud. Since the 1980s, pursuant to its authority under Sections 5 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b), the Commission has obtained hundreds of injunctions in federal district courts against fraudulent businesses and returned billions of dollars to harmed consumers.

B. Undercover Investigations Provide Valuable and Credible Evidence

The Commission's experience in investigating and enforcing consumer protection laws for many decades unequivocally demonstrates that fraudsters do not operate in the light of day. Instead, they typically attempt to avoid detection by operating through a confusing web of shell companies and different websites, phone numbers, and payment processors. When fraudsters get

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[1] The revision would amend RPC 8.4(c) as indicated: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."

[2] *See, e.g.*, the Telemarketing Sales Rule, 16 CFR Part 310, and the Mortgage Assistance Relief Services Rule, 16 CFR Part 322 (rules targeting fraudulent practices).

wind of a law enforcement action, they move quickly to destroy evidence and hide their ill-gotten gains. The Commission has documented these evasive tactics in affidavits filed in hundreds of federal court actions.

The Commission has developed and utilized a variety of techniques to investigate and prosecute consumer fraud cases, as well as to obtain redress and other relief for injured consumers. For example, FTC staff investigators sometimes pose as consumers and purchase a product on a website or sign up for a service promoted by a telemarketer. The investigator stands in the shoes of consumers, observes the conduct consumers observe, and gathers evidence of possible law violations.

The interactions captured by FTC investigators often provide the most probative evidence of how a business actually treats consumers, exposing deceptive and unfair practices that might otherwise go undetected or unprosecuted. Courts have recognized and relied on this evidence. For example, in *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 635 (6th Cir. 2014), a panel of the Sixth Circuit affirmed summary judgment in the FTC's favor based in part on evidence that a sales agent failed to make required disclosures to an undercover investigator. Similarly, in *FTC v. IAB Mktg. Assocs.*, 746 F.3d 1228, 1231 (11th Cir. 2014), the Eleventh Circuit held that the district court did not err in entering a preliminary injunction against a company where its representatives falsely "assured the investigators that IAB's medical-discount plans were functionally equivalent to major medical insurance." Investigators also provided critical evidence based on undercover work in *FTC v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1268 (M.D. Fla. 2012), *aff'd*, 704 F.3d 1323 (11th Cir. 2013) (telephone calls recorded by undercover investigators confirmed defendants' use of deceptive telemarketing scripts); *FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1326 (M.D. Fla. 2010) (undercover investigator's account confirmed that company told consumers that it would lower their credit scores); and *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1073 (E.D. Mo. 2007) (recorded phone calls between FTC investigators posing as consumers and sales agents confirmed deceptive sales claims).

In these and other cases, the evidence obtained by investigators corroborated consumer testimony. Often, an investigator's careful account of a series of transactions provides the most accurate information about a disputed business practice. *See, e.g.*, *FTC v. Direct Benefits Grp., LLC*, No. 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *8 (M.D. Fla. July 18, 2013) (investigator's testimony largely tracked that of consumer witnesses, but investigator testified to receiving disclosure email that consumers did not recall). In other instances, undercover work may fail to corroborate consumer complaints, leading the Commission to close an investigation. Whether inculpatory or exculpatory, the information obtained in undercover investigations is highly probative.

This Court, in the criminal context, has recognized the necessity of undercover work in law enforcement:

> It is common knowledge that the nature of illicit drug traffic is such that the laws could not be enforced without undercover agents. The drug laws have forced the market place for illicit drugs underground, where sales are effected by stealth by those who reap

> financial gain at the cost of the drug victim and society. Without undercover agents, it would be virtually impossible to prosecute those who cause the sale and distribution of illicit drugs.

People v. Bucher, 182 Colo. 211, 214 (1973). In the civil context, the Tenth Circuit has similarly recognized the importance of undercover investigations, noting "[i]t would be difficult indeed to prove discrimination in housing without [using a tester for] gathering evidence." *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973); *see also United States v. Centennial Builders, Inc.*, 747 F.2d 678, 683 (11th Cir. 1984) ("Undercover work is a legitimate method of discovering violations of civil as well as criminal law.")

C. Attorney Oversight Helps to Ensure the Integrity of Undercover Investigations and Adds to Existing Protections

Attorneys play an important oversight role in the collection of evidence from undercover operations by, for example, advising investigators not to cross the line between capturing and instigating a law violation. *See, e.g.*, *Bucher*, 182 Colo. at 214 (acknowledging defense of entrapment). Similarly, attorneys can advise investigators about the relevant state and federal statutes governing the recording of telephone or live interactions.[3] Such legal advice is particularly important because illegal operations often cross state lines, and it is not always clear which jurisdictions' law will govern the investigation. As recent experiences in Colorado illustrate, attorney oversight appears preferable to the alternatives – foregoing law enforcement activities[4] or cordoning off investigators from their supervising attorneys.[5] Attorney engagement in the process increases accountability. If, as the revised rule contemplates, attorneys oversee this aspect of gathering evidence, then they also are responsible for any problems, potentially facing discipline for any misconduct related to the investigation. Permitting attorney supervision of "lawful investigative activities," as this Court has proposed, helps to ensure that the investigative activities are, in fact, lawful.

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[3] Recordings of telephone calls made by FTC investigators comply with the federal wiretap statute, 18 U.S.C. §§ 2510-2522, which permits recordings made by a party to a telephone call. 18 U.S.C. § 2511(2)(c). Evidence of intercepted communications that conforms to this provision is admissible in federal court proceedings without regard to state law. *United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982).

[4] *See* Pet. for Original Writ at 1, 3, *In Re: Cynthia H. Coffman v. Office of Attorney Regulation Counsel*, No. 2017SA92 (May 5, 2017) (Attorney General abandoned all of her pending undercover investigations because of fear that her attorneys would be subject to ethics complaints for supervising them).

[5] *See* Pet. for Original Writ, *supra* note 3, at 2-3 & Ex. 3 (Jefferson County's Child Sex Offender Internet Investigations team was dissolved and reconstituted in a sheriff's office in response to ethics complaint).

FTC investigators, whose work is critical to effective enforcement of the FTC Act and other statutes that protect consumers, conduct their undercover investigations with skill, integrity, and professionalism. Neither FTC investigators nor the attorneys who supervise them, however, operate without constraint. FTC attorneys are subject to the Rules of Professional Conduct of their licensing state and the choice of law provisions therein (pre-complaint) and the conduct rules and choice of law provisions in which the case is filed (post-complaint). The Rules of Professional Conduct also reach attorneys' supervision of investigators and other staff. *See, e.g.,* Colo. RPC 5.3. As FTC employees, investigators as well as attorneys must comply with the agency's own procedures as well as federal ethics laws and regulations. Persons injured by illegal acts of government employees may seek remedies through *Bivens* actions in appropriate cases or against the United States under the Federal Tort Claims Act, and litigants may raise relevant defenses such as unclean hands. All of these restrictions and remedies protect citizens from improper investigatory practices and limit the risk of harm, if any, that might be caused by the proposed revision of Rule 8.4.

The Court's proposed revision appears to be a limited clarification; it is not a license to engage in abusive investigative tactics. For example, had the proposed revision been in place at the time of *In re Pautler*, 47 P.3d 1175 (Colo. 2002), it would not have altered the outcome, in which this Court affirmed sanctions against a prosecutor who violated Rule 8.4(c) by impersonating a public defender to persuade a suspect to surrender to authorities. Indeed, it is notable that the only other state supreme court to approve sanctions against attorney conduct similar to what occurred in *Pautler* permits (through a comment to its rules) attorney supervision of lawful covert activity in the investigation of criminal activity and other unlawful conduct. *Disciplinary Counsel v. Brockler*, 145 Ohio St. 3d 270, 48 N.E.3d 557 (2016) (prosecutor violated 8.4(c) by creating a fictitious social networking account to contact defendant's alibi witnesses). The proposed revision retains the core prohibitions of Rule 8.4 and offers no protection to attorneys who engage in abusive investigatory practices.

Evidence obtained through undercover investigations is significant to civil and criminal justice. Attorneys can help protect the legality of evidence gathered. Thus, it is not surprising that the majority of jurisdictions that have considered the issue have permitted attorney oversight of undercover investigations, whether through ethics opinions,[6] comments,[7] or amending the relevant professional conduct rule itself,[8] as this Court has proposed.

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[6] *See, e.g.*, D.C. Bar Opinion 323 (2004) (attorney is not precluded from misrepresenting identity or other matters in support of covert activity as part of official duties for government agency); Va. Legal Ethics Op. 1765 (2003) (attorney employed by the federal government may use lawful undercover methods without violating 8.4(c)); Utah State Bar Ethics Advisory Op. Comm. Op. 02-05 (2002); D.C. Bar Opinion 229 (1992) (per se rule against attorneys tape recording conversations is not appropriate); *see also* Ariz. Bar Op. 99-11 (1999) (private attorney's direction to tester to make misrepresentations "solely about their identity or purpose in

This Court's proposed revisions to the Colorado Rules of Professional Conduct recognize the attorney's unique role as "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Colo. RPC Preamble [1]. Moreover, the revision promotes the continued development of the rules as a "framework for the ethical practical law." *Id.* at [16].

For these reasons, the Commission supports the Colorado Supreme Court's proposed revision to the Colorado Rules of Professional Conduct.

By direction of the Commission.

Donald S. Clark
Secretary

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contacting the subject of investigation for fact-gathering purposes does not violate any provision of the model rules.")

[7] *See, e.g.*, Iowa RPC 32:8.4(c), cmt. [6]; N.C. RPC 8.4(c) cmt. [1] (government lawyer may advise investigatory personnel); Tenn. RPC 8.4(c), cmt. [5] (8.4(c) does not prohibit prosecutors from directing investigative techniques that may be regarded as deceitful).

[8] Ala. RPC 3.8(2) (special provision allowing prosecutor involvement in government undercover and sting operations); Fla. RPC 4-8.4(c) ("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, unless prohibited by law or rule[.])"); Mo. RPC 4-8.4(c) (2012) (law enforcement undercover investigations are not professional misconduct); Or. RPC 8.4(b) (exception for "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."); Wi. SCR 20:4.1(b) (2013) (lawyer may advise or supervise others with respect to lawful investigative activities).

LOWREY | PARADY
ATTORNEYS AT LAW

September 5, 2017

Cheryl Stevens
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Via Email Only

RE: Proposed change to Rule 8.4(c) of the Colorado Rules of Professional Conduct.

Dear Ms. Stevens:

Thank you for the opportunity to provide feedback on the proposed change to Colo. RPC 8.4(c). I am a member of the Colorado Bar Association's Ethics Committee, the National Employment Lawyers Association's Ethics Committee, board member of the Colorado Trial Lawyers Association and chair of its Employment Law Committee, and Vice President of the Colorado Plaintiff Employment Lawyers Association. This letter does not reflect the position or interests of those organizations. Rather I include my affiliations to help show where my comments are coming from.

I support the idea behind the proposed amendment. The Rules of Professional Conduct should allow civil rights attorneys to employ covert investigators to reveal unlawful discrimination, intellectual property attorneys to employ investigative testing-customers to reveal trademark violations, and government attorneys to supervise undercover officers to lure and catch sex predators.

But the language of the proposed amendment is too vague as it is ambiguous whether the amendment would permit an attorney to violate Colo. RPC 4.2 through the acts of another. Under the proposed amendment, "It is professional misconduct for a lawyer to engage in conduct, involving dishonest, fraud, deceit or misrepresentation *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*." Put differently, it is not professional misconduct to advise, direct, or supervise

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others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities. Does this mean a lawyer must comply with the remaining Rules of Professional conduct when advising, directing, or supervising such activities? Or does this rule mean that it is not professional misconduct for an attorney to supervise or direct others who participate in lawful investigative activities regardless of the attorney's compliance with the rest of the Rules?

I disagree with the Pretexting Subcommittee's conclusion in the Supplemental Report of the Pretexting Subcommittee that "The current proposal does not create or imply any new exception to Rule 4.2." To me, and many colleagues with whom I've discussed the proposed amendment, whether the proposal implies a new exception to Colo. RPC 4.2 is ambiguous.

Currently under Colo. RPC 4.2, an attorney may not communicate with a represented party about the subject of representation. Nor may an attorney violate Colo. RPC 4.2 by assisting or inducing another to do so or by doing so through the acts of another.

The proposed amendment, however, permits an attorney to direct, advise, or supervise an investigator participating in lawful investigative activities. It is not clear that the amendment maintains Colo. RPC 4.2 and Colo. RPC 8.4(a)'s restrictions on an attorney communicating with a represented party through the acts of another.

The amendment permits such supervision or direction when the client or investigator participates in *lawful investigative activities*. But the proposed amendment does not clarify whether Colo. RPC 8.4(a) or 5.3, which restrict the activities of a third party if the activities occur at the direction of a lawyer, restrict what is "lawful" in this context. For instance, the amendment does not clarify whether an investigator may make false statements of material fact as part of the investigation or whether such false statements are unlawful under Colo. RPC 4.1, 5.3, and 8.4(a) because the investigation is being supervised or directed by an attorney.

I am not aware of any law that generally restricts an investigator from communicating with a person represented by an attorney. Arguably then, this amendment permits an attorney to supervise or direct an investigator who communicates with a represented person about the subject of representation as long as the communication is part of the investigator's lawful investigative activities.

Colo. RPC 4.2 amplifies this confusion. Colo. RPC 4.2 prohibits communications about the subject of representation with a represented party "*unless the lawyer . . . is authorized to do so by law*." Would the proposed amendment be a law authorizing attorneys to communicate about the subject of representation with a represented party so long as the attorney uses an investigator and does not communicate directly with the party?

The comments to Colo RPC 4.2 also amplify the confusion. Colo. RPC 4.2 [cmt. 4] notes that "A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." And Colo. RPC 4.2 [cmt. 5] notes that "Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." Both comments limit the scope of Colo RPC 4.2's prohibitions on communicating with represented parties and recognize circumstances where it is acceptable for an attorney to engage in conduct that would otherwise violate Colo. RPC 4.2. It is reasonable to assume that attorneys will read the proposed amendment in conjunction with these comments and believe that supervising or directing an investigator who communicates with a represented party is an exception to Colo. RPC 4.2 and Colo. RPC 8.4(a)'s general prohibition on making such communications through the acts of another.

Some may note that because the proposed amendment does not explicitly create an exception to Colo. RPC 4.2, it should be obvious that an attorney may not use the amendment to subvert Colo. RPC 4.2. But despite not explicitly creating an exception to other parts of the Rules of Professional Conduct, for the proposed amendment to work as expected, it impliedly creates exceptions to other rules.

The proposed amendment is an implied exception to Colo. RPC 8.4(a) and 5.3(b). Absent the proposed amendment, an attorney cannot engage in conduct involving dishonesty through the acts of another and an attorney must make reasonable efforts to ensure that a nonlawyer assistant's conduct complies with lawyer's professional obligations. With the amendment, an attorney can engage in conduct involving dishonesty through the acts of an-

other if the acts of another are part of lawful investigative activities. And an attorney need not make reasonable efforts to ensure that the investigator complies with a lawyer's obligation not to engage in conduct involving dishonest or deceit.

And to be effective, the proposed amendment is an implied exception to Colo. RPC 4.3. Colo. RPC 4.3 prohibits an attorney from stating or implying that the lawyer is disinterested when communicating on behalf of a client with a person who is not represented. It also requires a lawyer to make reasonable efforts to correct a misunderstanding as to a lawyer's role in a matter. As a few of the other commentators to the Pretexting Subcommittee have noted, a covert investigation is not possible if the investigator may not state or imply that he or she is disinterested and is forced to correct misunderstandings as to the investigator's role. To work, the proposed amendment must impliedly create an exception to the rule that under Colo. RPC 4.3 and Colo. 8.4(a), an attorney may not, through the acts of another, state or imply that the lawyer is disinterested.[1]

And the proposed amendment likely creates an implied exception to Colo. RPC 4.1, which prohibits an attorney from making a false statement of material fact to a third party when representing a client. The deception used to conduct a covert investigation will often be material. *See In re Fischer*, 202 P.3d 1186, 1201 (Colo. 2009) ("A statement is material if it could have influenced the listener.").

To effectuate the purpose behind the proposed amendment, the amendment must impliedly create exceptions to some of the Rules of Professional Conduct. But the amendment does not

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[1] The Final Report of the Pretexting Subcommittee notes that "Because the proposed changes to R.P.C. 8.4(c) discussed below do not permit direct lawyer participation in pretext investigation, but expressly contemplate the involvement of non-lawyer assistants, the subcommittee concluded that R.P.C. 4.3 probably would not be implicated." I disagree. Colo. RPC 4.3 must be read in conjunction with Colo. RPC 8.4(a). A lawyer may not violate Colo. RPC 4.3 through the acts of another. Absent the proposed amendment, many pretext investigations would violate Colo. RPC 4.3's prohibition on stating or implying disinterest through the acts of the investigator because an investigator usually must pose as a disinterested customer or tester.

cross-reference these rules. Accordingly, it is reasonable to assume that an attorney using the rules for guidance will conclude that either the amendment's effect is extremely limited because an attorney may not violate Colo. RPC 4.1 or 4.3 through the acts of the investigator or is extremely broad, allowing him or her to violate Colo. RPC 4.1, 4.2, and 4.3.

To avoid confusion, the proposed amendment should be revised to reference Colo. RPC 4.2. And because the "policy interests in protecting the attorney-client relationship that come into play once the target of the investigation has obtained counsel help outweigh the investigative needs of the other party," the reference to Colo. RPC 4.2 should make clear that even when an attorney supervises or directs an investigator who participates in lawful investigative activities, an attorney may not use that supervision or direction to circumvent Colo. RPC 4.2

Sincerely,

Ben Lebsack

August 30, 2017

Honorable Justices of the Colorado Supreme Court:

COMMENTS TO PROPOSED RULE CHANGE, RULE OF PROFESSIONAL CONDUCT 8.4 (c)

I write to urge the court not to adopt the proposed change to R.P.C. 8.4 (c). The proposed change is taken from the language of a subcommittee report of the Standing Committee on the Rules of Professional Conduct. However, that language was never adopted by the whole committee. I was a member of the subcommittee and I did not support a change to the rule.

I know that you have been presented with all of the background information on the committee's difficulty to reach a consensus on this issue. For your convenience I am attaching to these comments a copy of my statements opposing adoption of the change in the minutes of the July 13, 2012 of the Standing Committee on the Rules of Professional Conduct. At the vote at that meeting the language proposed by the majority of that subcommittee failed with only 7 in favor and 10 opposed. In fact, the ultimate vote of the whole committee was 9 in favor and 8 opposed to recommend no change to the rule. What then occurred was all of the background information was forwarded to the Supreme Court. The committee discussion of the proposed changes to 8.4 (c) is contained in the July 13, 2012 minutes.

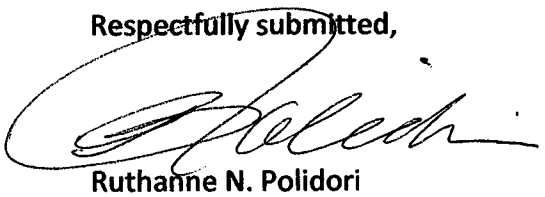
I have only a few additional things to add to my comments in the attached minutes. First, should the court choose to adopt a modification to the rule the word "direct" should not be included. If a lawyer cannot lie, it would be inappropriate for the rule to condone the lawyer directing his client or another to lie. Mark Pautler could not himself engage in deceit and lies. Under the rule as proposed could he direct someone else to do what he did and suffer no consequence?

While I would prefer that no change be made to the rule, I recognize that there is case law which protects lawyers involved in certain governmental investigative activities. For that reason the court may want to give some consideration to the language of the subcommittee's minority report. However, I would suggest a modification to that language to further clarify an exception as follows:

"(c) engage in conduct involving dishonesty, fraud , deceit or misrepresentation, except that a lawyer employed by a government agency authorized to investigate unlawful activity may advise or supervise others including clients, law enforcement officers or other investigators involved in the investigation."

Lawyers in the United States are the guardians of liberty and justice. Liberty and justice don't tolerate dishonesty, fraud, deceit or misrepresentation. Neither should the rules which govern lawyers.

Respectfully submitted,



Ruthanne N. Polidori
Retired District Court Judge

> It is worth noting, however, that it would have been inaccurate to characterize even the original proposal as containing "a subjective 'good faith' standard for the lawyer's belief that his/her actions were lawful and in compliance with the exceptions noted in the amendments" . . . . The original proposal required that the lawyer "reasonably and in good faith believes" that the action was within the scope of the scope of the lawyer's law enforcement duties (government), or that the law had been violated and the activity would aid the investigation (private), requiring a belief that is at once objective and subjective. . . . To the extent that the original proposal was overly nuanced concerning intent, the current proposal in any event avoids this concern.

Downey explained that the majority's proposal extends the exception to all lawyers; it is not limited in scope to law enforcement matters and to prosecutors.

And Downey explained that, because there is no conflict between the majority's proposal and Rule 4.2 — the exception does not permit direct action by a lawyer and thus cannot lead to a lawyer's "[communication] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter" as is prohibited by Rule 4.2 — there is no need to state that amended Rule 8.4(c) provides an exception to Rule 4.2.

Downey then asked Judge Polidori to explain the minority's positions.

Judge Polidori began by noting that, at the thirty-first meeting of the Committee, on January 6, 2012, she had pointed out that there was not unanimity on the proposal made by the subcommittee at that time; now, she said, the minority has provided its own report to the Committee, which is included in the subcommittee supplemental report beginning at page 31.

Characterizing herself as old-fashioned, Judge Polidori said she became a lawyer because it was an honorable profession. We should, as lawyers, be above the common man; we should not permit dishonest conduct by lawyers even if it is "lawful." Some matters can be lawful but still dishonest, as the minority stresses in its report.[7]

It is hard for her, the judge said, even to allow that a government lawyer may engage in advising, directing, or supervising deceptive conduct by others — which is the first of the two alternative proposals made by the minority — but she recognized that there is caselaw supporting that proposition and referred to Opinion 96 of the Colorado Bar Association Ethics Committee.[8] And, she added, there are constitutional guarantees of individual rights — and the exclusionary principle as a check — applicable to the activities of prosecutors and others in law enforcement, guarantees and checks that are not applicable to conduct by private lawyers.

Accordingly, the first alternative proposed by the minority to the proposal made by the majority was to amend Rule 8.4(c) to read as follows [showing the change to the majority's proposal]:

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7. "Because the legality of private conduct involving fraud, deceit, or misrepresentation could be ascertained from statutes and the common law of torts, the Rule's use of the term 'dishonesty,' which alone is neither the basis of any tort nor an element of any crime, must go further." Minority Report, p. 34 of Pretexting Subcommittee's Supplemental Report.

8. *See* CBA Ethics Committee Ethics Opinion 96, Ex Parte Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, 07/15/94. The opinion is available at http://www.cobar.org/index.cfm/ID/386/subID/1817/CETH/Ethics-Opinion-96:-Ex-Parte-Communications-with-Represented-Persons-During-Criminal-and-Civil-Regula/.

It is professional misconduct for a lawyer to:

. . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer ***representing the government*** may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

There is, said Judge Polidori, no caselaw supporting the proposition that private lawyers may engage in "lawful deceit." She sympathized with the stakeholders who lobbied this Committee for exceptions to Rule 8.4(c) — the intellectual property rights lawyers and other business lawyers who are stymied in how to represent their clients. But the majority's proposal would extend the exception to all lawyers, and the judge said she could not imagine what deceits and dishonesties some practitioners might be able to think up in the course of representing their clients. She said she did not intend to imply that lawyers engaged in intellectual property rights practices were of a better caliber than other lawyers practicing in other areas, but she said that so much of what occurs in some other practice areas are "in horrible situations."

Judge Polidori pointed out that the minority's second alternative to the majority's proposal is the proposal that the Committee take no action, make no proposal to the Court to change Rule 8.4(c) or add any comment. She had no preference between the minority's two alternatives.

The judge pointed out that the minority's government-lawyer-only proposal refers to "a lawyer representing the government" rather than to a "governmental lawyer," which was the phrase used in the subcommittee's initial report, considered at the Committee's thirty-first meeting, on January 6, 2012.[9]

Judge Polidori concluded her remarks by saying it is just not appropriate to change a rule for the benefit of a few when the likelihood of abuse of the rule, as changed, is so apparent.

Downey responded to Judge Polidori's comments by saying that the majority, too, recognized that lawyers may engage in misconduct in their various practices. The majority's proposal, he argued, does not permit misconduct; and, he added, similar to the constitutional principles and exclusionary rules applicable to government lawyers, there is a significant check on the conduct of a private practitioner, that check being a nasty letter from the Office of Attorney Regulation Counsel. There are also actual cases in which opposing counsel have obtained court sanctions as a result of investigative misconduct in civil cases.

Downey noted, again, that the Preamble to the Rules of Professional Conduct highlights the lawyer's role as an advisor to his client. Why, he asked, cannot a lawyer advise a client about lawful conduct that the client may engage in, and give that advice without fear of a disciplinary proceeding?

As to the distinction that Judge Polidori noted between a "lawyer representing the government" and a "government lawyer," Downey noted that the majority's proposal applies equally to all lawyers, whether in government service or in private practice. The proposal guides all lawyers; and there is a need, he argued, for such guidance in Rule 8.4(c), guidance as to what a lawyer may do in the role of advisor.

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9. "The phrase 'a lawyer representing the government' avoids potential uncertainty in the phrase 'government lawyer,' which could be interpreted as applying to lawyers who are paid by, but do not represent, the government, such as public defenders, alternative defense counsel, and legal services lawyers." Minority Report, p. 31 of Pretexting Subcommittee's Supplemental Report.

RE/MAX
Each Office Independently Owned and Operated.

September 5, 2017

e-mail: ascoville@remax.com
direct: 303.796.3609

The Honorable Nancy E. Rice
Chief Justice
Colorado Supreme Court
2 E. 14th Avenue
Denver, Colorado 80203
via e-mail
cheryl.stevens@judicial.state.co.us

RE: Support for Proposed Change to the Rule 8.4(c) of the Colorado Rules of Professional Conduct

Dear Chief Justice Rice and Justices of the Colorado Supreme Court:

RE/MAX, LLC supports the proposed change to Rule 8.4(c) of the Colorado Rules of Professional Conduct to allow lawyers to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."

About RE/MAX
Based in Denver, Colorado, RE/MAX, LLC ("RE/MAX") is one of the world's leading franchisors of real estate brokerage service. Over 115,000 real estate agents provide the RE/MAX brand a global reach of more than 100 countries and territories, making RE/MAX one of the most globally well-known brands to be headquartered in Colorado. Nobody in the world sells more real estate than RE/MAX, when measured by closed residential transactions. RE/MAX and Motto Mortgage, an innovative mortgage brokerage franchise, are subsidiaries of RMCO, LLC, which is controlled and managed by RE/MAX Holdings, Inc., a public company traded on the New York Stock Exchange.

Comments in Support of the Proposed Change

During 2011 and 2012, I served as a member of the Pretexting Subcommittee for the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct and participated extensively in its consideration of the issues surrounding the use of pretexts in investigations.

1. **The proposed change to Rule 8.4(c) is necessary to clarify attorneys' obligations and bring Colorado in line with the majority of other states.**

For many companies, investigations are necessary to substantiate a consumer's report of having been confused into buying a competitor's product, to trace a counterfeit product to its source, or otherwise to ascertain whether a competitor has violated the company's intellectual property rights. The consensus view in civil cases outside of Colorado—illustrated in the cases collected in the 2012 Supplemental Report of the Pretexting Subcommittee and presented in legal education seminars nationwide—is, in essence, that so long as the investigator limits the pretext to what is necessary to be treated like a member of the consuming public, the lawyer's retention and supervision of the investigator does not violate ethical rules.

Whether the same can be said in Colorado in light of *In re Pautler*, 47 P.3d 1175 (Colo. 2002) is not clear. Dicta in *Pautler*, and more recently the institution of a disciplinary proceeding against the Jefferson County District Attorney's Office, have given rise to substantial uncertainty about the boundaries of permissible pretext investigations. However, the Supreme Court in *Pautler* upheld the attorney's

discipline, in part, *because* it was *not* of the kind that would have been eligible for the proposed exception. The Court rejected Pautler's attempt to categorize his actions as the kind permitted in other states, noting, "The two jurisdictions that have created exceptions to [8.4(c)'s] blanket prohibition limited them to *circumstances inapposite here.*" *Id.* 1179 (emphasis added). Tellingly, those circumstances were "undercover investigative operations" that were "otherwise lawful," where the attorney's role is limited to "supervising or advising"—in other words, similar parameters to those contained in the proposed change. *Id.* 1179 n.4. Indeed, subsequent to *Pautler*, Wisconsin adopted an exception to Rule 4.1 extremely similar to the one proposed here: "4.1(b) Notwithstanding [Rule 4.1(a)], [Rule 5.3(c)(1)], and [Rule 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities."[1] By contrast, the deception Pautler committed, despite the extraordinary circumstances, was particularly problematic—a prosecutor personally communicating with a capital defendant and posing as the defendant's own attorney.

2. Prohibiting attorney supervision of investigations involving pretexts may make unlawful investigative tactics more likely, not less.

If the Court chooses not to adopt the proposed change, Colorado attorneys would be left to conclude that advising, directing, or supervising others in lawful investigations involving pretexts is prohibited. Prohibiting attorney supervision does not prohibit pretext investigations but it does prevent organizations from employing attorneys to help ensure that such investigations are conducted in a lawful and ethical manner. True, if an investigation crosses the line into the unlawful, criminal penalties or civil liability may apply if the conduct is discovered. But in-house and outside counsel are in the best position to know about an investigation (which is, after all, covert), to advise on what is lawful, and to promote the use of only those proper and lawful means that come within the boundaries of the exception.

That the current rule would result in shifting investigations out of the supervision of legal departments, outside counsel, and government law offices is more than a hypothetical possibility. As a case in point, after a complaint to the Office of Attorney Regulation Counsel concerning pretext investigations conducted by the Jefferson County District Attorney's Office's "CHEEZO" unit, the unit was merely shifted to the Jefferson County Sherriff's Office.[2] Doubtless, numerous lower-profile shifts have occurred, or will occur if the Colorado Supreme Court definitively decides not to change Rule 8.4(c).

3. The "lawful investigative activities" exception allows the supervision/direction of different conduct by government investigators than by private investigators.

Significantly, the "lawful investigative activities" exception allows lawyers to advise, supervise, or direct a broader range of conduct by law enforcement investigators than by a private citizen such as a private investigator, paralegal, or other non-lawyer assistant. In 2011, the first (so-called "Final") report of the Pretexting Subcommittee proposed a new two-tier standard in an attempt to be more permissive with respect to law enforcement investigations than other investigations. When the Subcommittee ultimately recommended a greatly simplified standard—the proposed rule change before the Court now—it did not

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[1] Although the Wisconsin rule helpfully clarifies that the exception, where applicable, supersedes Rules 4.1(a), 5.3, and 8.4(a), the proposed exception's allowance of a lawyer's involvement with some specific kinds of conduct by non-lawyer assistants should, as a matter of construction, control over these rules' general prohibitions.

[2] *See* Kieran Nicholson, *Disbanded Child Sex Offender Investigators Back to Work in Jeffco*, THE DENVER POST, Feb. 2, 2017, available at http://www.denverpost.com/2017/02/02/child-sex-offender-investigators-jeffco/; Jesse Paul, *Colorado AG Halts All In-House Undercover Investigations amid Ethics Questions about 'CHEEZO' Unit*, THE DENVER POST, May 12, 2017, available at http://www.denverpost.com/2017/05/12/jeffco-cheezo-unit-ethics-concerns/ (quoting Colorado Solicitor General Fred Yarger, "What would happen is these investigations wouldn't cease, it's just that lawyers wouldn't be involved in them.").

do away with this graduated approach. Rather, it recognized that "lawful investigative activities" *is* a graduated standard. What is lawful for law enforcement investigating a criminal matter is more expansive than what is lawful for a private citizen, such as a private investigator conducting an investigation prior to the filing of a civil lawsuit. And the "lawful investigative activities" standard leverages voluminous, established law in either context—from the Fourth Amendment to what would be a fraudulent misrepresentation or a tortious invasion of privacy—to guide courts and the Office of Attorney Regulation Counsel concerning what the investigator may lawfully do.

4. Without the proposed change, Rule 8.4(c) unnecessarily disadvantages Colorado businesses and law firms.

Finally, not allowing attorney supervision of pretext investigations disadvantages Colorado businesses. Specifically, it significantly restricts their ability to protect their rights – including those aimed at consumer protection – in the United States and around the world. Colorado companies increasingly have to guard against intellectual property infringement, counterfeiting, and piracy around the world. RE/MAX would be concerned by another real estate company calling itself "Remax" or using a red, white, and blue balloon logo not only in the United States, but anywhere our authorized network has a presence, where we expect eventually to have a presence, and in other "hot spots" where a bogus "Remax" operation could damage our brand's reputation or perpetrate fraudulent scams and phishing schemes over the Internet.

To engage in effective intellectual property protection worldwide, many U.S. brand owners rely on their in-house intellectual property attorneys to engage an outside law firm (sometimes known as "coordinating counsel") that manages, on behalf of multiple clients, relationships with a network of local counsel in countries around the world. When in-house counsel learns of potential infringement in a foreign country, they may instruct (or *direct*) local counsel (directly, or through coordinating counsel) to have an investigation performed. Quite simply, the infrastructure for investigating intellectual property infringement is through networks of lawyers, *supervised* by in-house counsel. And investigators may need to pose as customers in order to be able to gather information about intellectual property infringement. This type of investigation is commonplace in the majority of states and even in many other countries, which allow the use of pretext investigations within appropriate boundaries. A company's in-house counsel should legitimately be able to direct or supervise the retention of non-lawyer investigators, or advise business units in their retention of investigators. If they cannot do so, this places companies headquartered in Colorado (or whose intellectual property attorneys are based here) at a competitive disadvantage in preventing infringement in the global marketplace.

Thank you for the opportunity to comment in support of the proposed rule change to Rule 8.4(c) of the Colorado Rules of Professional Conduct. If we can provide further information, please feel free to contact me.

Very truly yours,

Adam Lindquist Scoville
Vice President, General Counsel and Chief Compliance Officer

BFW ATTORNEYS
BURNS FIGA & WILL

Alexander R. Rothrock
Attorney at Law
arothrock@bfwlaw.com

September 5, 2017

Via E-mail: Cheryl.stevens@judicial.state.co.us

Colorado Supreme Court
c/o Cheryl Stevens, Chief Deputy Clerk
of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Amendment to Colo. RPC 8.4(c)

Dear Chief Justice Rice and Members of the Court:

I support the proposed amendment. I supported it in 2012, as a member of the Court's Standing Committee on the Rules of Professional Conduct and as a member of the subcommittee formed by the Standing Committee to study the issue. Although I have some misgivings about how lawyers may use this rule if the Court adopts the amendment, allowing lawyers to "advise, direct, or supervise" lawful investigations would have the net positive effect of promoting the lawfulness and integrity of these investigations. The amendment would also avoid the counterproductive charade of lawyers having to absent themselves from the conduct of investigations that they themselves may have recommended in the first place.

Our subcommittee considered innumerable drafts of proposed rules and comments. We settled on the language of the proposed Amendment. I believe it strikes the right substantive balance and possesses the virtue of simplicity.

Very truly yours,

BURNS, FIGA & WILL, P.C.

Alec

Alexander R. "Alec" Rothrock

COLORADO
Department of
Regulatory Agencies
Executive Director's Office

September 5, 2017

Colorado Supreme Court
C/o Cheryl Stevens, Chief Deputy Clerk of the Supreme Court
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

RE: Proposed Amendment to Colo. RPC 8.4(c)

Dear Chief Justice Rice and Members of the Court:

I am writing to inform you that the Colorado Department of Regulatory Agencies ("DORA") urges your consideration to amend Colorado Rule of Professional Conduct 8.4 (c) ("Rule") to allow for a government lawyer to have the ability to advise or direct others within government agencies regarding issues related to undercover investigations. Law enforcement officials and regulatory investigators, while participating in statutorily conferred investigative activities quite often find it necessary to seek the guidance of counsel. The Rule as currently drafted forecloses the ability of government attorneys from providing that needed guidance when a law enforcement official or regulatory investigator conducts an undercover investigation.

The Department of Regulatory Agencies is an umbrella regulatory agency with nine distinct divisions, including the Divisions of Banking, Financial Institutions, Insurance, Professions and Occupations, Real Estate, and Securities as well as the Colorado Civil Rights Division, the Public Utilities Commission, and the Office of the Consumer Counsel. At the core of the agency's mission is consumer protection, which heavily depends on consumers submitting complaints and the divisions' respective ability to thoroughly investigate within statutory authority. The Office of the Colorado Attorney General serves as the legal counsel for the agency, therefore the recommended amendment allows for the Attorney General to provide guidance, as requested by the agency, regarding undercover investigative activity.

The ability to conduct undercover investigations is an important enforcement tool that supports the agency's overall goal to protect consumers. For example, the Division of Profession and Occupations (DPO), which licenses more than 345,000 licensees within more than 50 professions, occupations, and entities in the State of Colorado, regularly depends on

undercover investigations after a complaint has been filed. DPO also engages in undercover activities to issue board-directed subpoenas when professionals are found in violation of state law. Additionally, the Public Utilities Commission (PUC) conducts undercover investigations to enforce transportation laws. This activity is designed to identify unlawful operators and operations that are violating Colorado state transportation laws. Such investigations are initiated by complaints, generally from legal transportation companies, and are the only way to determine if there is unlawful activity. These investigations allow the PUC to enforce laws that prohibit street hails of ride share companies, as they are prohibited by state law, and stop the operation of illegal common carriers (taxis). Lastly, the Division of Securities regularly conducts undercover investigations via computer or telephone to identify and deter unscrupulous securities salesmen who are pitching fraudulent investments over the internet or through cold calling, primarily targeting seniors and other vulnerable populations. While counsel is currently not engaged prior to any undercover investigative activity at DORA, the clarity for the Attorney General to have the ability, if requested by the agency, to provide legal counsel to DORA as it relates to undercover investigative activity would further support our efforts to enforce state laws in order to protect consumers.

Further, this amendment would clarify the ability of attorneys who serve as agency staff directly within divisions, while not acting in the capacity as legal counsel, the ability to participate in undercover investigatory activities. This is of particular importance for director-model programs, where the director has the ability to initiate an investigation in their role as a director.

Undercover investigations are critical to governmental regulatory agencies' ability to protect consumers. This amendment would allow for undercover investigations within government agencies to be further supported by the Attorney General, as needed, to ensure that the agency continues to act in compliance with the spirit of the law. It is in the public interest to allow law enforcement and investigators with government agencies to work with government attorneys to ensure investigations are conducted lawfully. Any proposed amendments should be limited to government attorneys and government and law enforcement agencies, and not to private attorneys and private clients. We respectfully urge the Court to amend Rule 8.4(c) to allow government attorneys to provide counsel to government and law enforcement agencies as it relates to statutorily conferred investigative activities.

Sincerely,

Marguerite Salazar
Executive Director
Colorado Department of Regulatory Agencies

International Trademark Association

Etienne Sanz de Acedo
Chief Executive Officer

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August 22, 2017

Ms.Cheryl Stevens
Chief Deputy Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: INTA's comments on Proposed Modification of Colorado Rule of Professional Conduct 8.4

Dear Ms. Stevens:

The Supreme Court has requested public comment regarding the proposed rule change to Colorado Rule of Professional Conduct (CRPC) 8.4. In response to that request, the International Trademark Association (INTA) submits this letter containing INTA's comments and recommendations regarding CRPC 8.4. We welcome the opportunity to provide our comments and thank the Court for considering INTA's views on this subject.

About INTA

Founded in 1878, INTA is the global non-profit association of trademark owners and professionals dedicated to supporting trademarks and related intellectual property in order to protect consumers and to promote fair and effective commerce. INTA's members are more than 7,000 organizations from 190 countries. The Association's member organizations represent some 30,000 trademark professionals and include brand owners from major corporations as well as small- and medium-sized enterprises, law firms and nonprofits. There are also government agency members as well as individual professor and student members. INTA undertakes advocacy work throughout the world to advance trademarks and offers educational programs and informational and legal resources of global interest.

The Importance of Pretext Investigations

Pretext investigations are an essential tool of trademark attorneys throughout the world. They are regularly conducted in the effort to fight counterfeiting as well as to evaluate priority rights between potentially confusingly similar marks. In the context of trademarks, pretext investigations refer to an otherwise lawful effort intended to obtain non-privileged information about and/or evidence in the investigation and determination of intellectual property rights through the use of misrepresentations or other subterfuge. Such investigations are often conducted directly by attorneys and by investigators hired and supervised by attorneys. By their nature, such investigations frequently involve making misrepresentations to employees or agents of

companies in order to purchase suspected counterfeit goods or otherwise obtain non-privileged information needed to aid in the evaluation of intellectual property rights.

Pretext investigations are integral to the administration of justice. Without such investigations, the distribution of counterfeit goods would be extraordinarily difficult (and in some cases impossible) to identify and stop, and brand owners would be deprived of an essential tool to avoid consumer confusion in clearing and evaluating trademark rights.

INTA's History On Pretext Investigations

As an important part of its mission, INTA is dedicated to improving trademark enforcement and anti-counterfeiting efforts worldwide. INTA has a long history advocating in favor of consistent worldwide rules and guidelines allowing pretexting investigations. INTA has regularly had standing committees investigating the problems with pretext investigations in the U.S.

In 2007 INTA's Board of Directors adopted a resolution endorsing ethical and legal pretexting as means to combat trademark infringement and counterfeiting ("Pretext Investigations Resolution https://www.inta.org/Advocacy/Pages/PretextInvestigationsinUSTrademarkInfringementCases.aspx). The Pretext Investigations Resolution urged governments to permit private pretexting or to create exceptions to prohibitions against pretexting in trademark infringement and counterfeiting investigations.

In 2012, INTA's Anticounterfeiting and Enforcement Committees provided comments on the final report prepared by the Pretexting Subcommittee of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct supporting amendments to the Colorado Rules of Professional Conduct that would permit pretext investigations.

In 2015 INTA published its Guide to Pretext Investigations in U.S. Trademark Practice and, in its "Submission On The Request For Public Comment Regarding The Third Joint Strategic Plan For Intellectual Property Enforcement" strongly recommended that the Office of the Intellectual Property Enforcement Coordinator create guidelines and standards for pretext investigations.

For many years, INTA's Judicial Administration & Litigation Subcommittee has convened a working group focused on pretext investigations. During the 2016-2017 term, the working group was specifically tasked with developing a proposal to modify the ABA Model Rules of Professional Conduct to permit *ethical* pretext investigations. That working group developed proposed modifications which have been approved by INTA. A copy of such proposed modifications are enclosed for your convenience.

Identifying the Problem

The Internet has transformed the market for branded goods and services. Consumers are exposed to legitimate brands as well as counterfeits not only in a single state, but also in interstate and international commerce. On the world stage, the U.S. is unique. No other country imposes such strict rules limiting its attorneys from engaging in pretext investigations and no other country has such varied inconsistency in such rules within its own sovereign borders. In most other countries of the world, attorneys are permitted to engage in any otherwise lawful activity in investigating and evaluating intellectual property rights, while US attorneys, are either hampered

in their ability to zealously represent their clients or otherwise engage in such investigations under the fear of professional sanction.

Pretext investigations are permitted by most U.S. courts subject to certain restrictions, however, there continues to be inconsistency among these rulings from state to state and inconsistency between such rulings and the express language contained in the applicable rules of professional conduct. The ABA Model Rules and some state rules either do not address the topic or, like Colorado, prohibit pretext investigations altogether.

The CRPCs at issue are:

4.1, which generally prohibits a lawyer from making a false statement of material fact or law to a third person;

4.2, which prohibits a lawyer from communicating about the subject of his or her representation with a person the lawyer knows to be represented by another lawyer;

4.3, which prohibits a lawyer from stating or implying that the lawyer is disinterested in dealing with a person who is not represented by counsel;

8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty; and

8.4 (a), which prohibits lawyers from hiring investigators to engage in conduct which would be prohibited by Rules 4.1, 4.2, 4.3 and 8.4(c).

Attorneys who engage in pretext investigations, whether directly or through hired investigators, in Colorado are in jeopardy of being accused of violating these rules as written.

Oregon's Solution

Oregon modified its rules of professional conduct to expressly permit pretext investigations following the Oregon Supreme Court's decision in *In re Gatti*, 9 P.3d 966 (Or. 2000). In that case, a private attorney, Daniel Gatti, introduced himself as either a chiropractor or a medical doctor interested in working for a company while investigating a case for fraud and intentional interference with contractual relations against the target company. The state bar found that Gatti had violated the Oregon Code of Professional Responsibility because he engaged in conduct involving dishonesty, fraud, deceit and/or misrepresentation by knowingly making false statements while representing a client. At that time, Oregon's code included an equivalent to Model Rule 8.4(c) and the Oregon Supreme Court held that "this court's case law does not permit recognition of an exception for any lawyer to engage in dishonesty, fraud, deceit, misrepresentation, or false statements." *In re Gatti*, 9 P.3d at 976. Two years later, Oregon changed the code to permit limited pretexting. In particular, Rule 8.4 states 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 of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by

> a lawyer or involve a lawyer as an advisor or supervisor only when 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.[1]

Oregon's current Rule 8.4 allows attorneys to advise about or supervise lawful pretexting in investigating violations of civil or criminal law or constitutional rights. However, "covert activity" may only be conducted if the attorney has a good faith basis to believe that there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

We emphasize that the Oregon rule change is not new. It has been in place and attorneys in Oregon have been practicing under it for over 15 years.

Colorado's Proposal Does Not Go Far Enough

The proposed revision to CRPC 8.4(c) provides an exception that expressly states that lawyers may oversee lawful investigations (something that lawyers would not otherwise be prohibited from doing in the absence of the proposal). Unfortunately, it does not adequately address the issues associated with pretext investigation in that it does not expressly permit the use of pretexting in such investigations that would otherwise be prohibited by CRPC 8.4 as well as CRPCs 4.1, 4.2, 4.3 and 8.4(a). Without simultaneously addressing these other rules, Colorado lawyers who oversee otherwise lawful pretext investigations expressly permitted by CRPC 8.4(c) may find themselves accused of violating CRPCs 4.1, 4.2, 4.3 and 8.4(a). Moreover, the qualification that the investigation must be lawful does not adequately solve the problem since, as addressed below, in some cases, the determination of whether a misrepresentation is lawful is a function of whether the CRPCs would justify a third party's reliance on the misrepresentation.

INTA's Proposal

Building on the Oregon solution, INTA has adopted the enclosed proposed redlined revision to the ABA Model Rules of Professional Conduct that addresses the issue of ethical pretext investigations, not only in Rule 8.4, but also as to Rules 4.1, 4.2 and 4.3. Specifically, the INTA proposal would allow "Covert Activity." As defined in the INTA proposal, "Covert Activity" is limited to an "otherwise lawful effort intended to obtain non-privileged information about and/or evidence in the investigation and determination of intellectual property rights through the use of misrepresentations or other subterfuge." Such Covert Activity may be used when 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.

INTA's proposal varies from the Oregon rules in two ways.

First, it ensures that lawyers who participate in pretext investigations that fall within the definition of "Covert Activity" permitted by Rule 8.4(c) will not find themselves accused of having violated of Rules 4.1, 4.2, 4.3 or 8.4(a).

Second, whether a misrepresentation is considered to be fraudulent may be determined, in part, by whether a third party's reliance on the misrepresentation is justifiable and whether, in the case

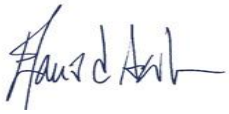
[1] Or. Code of Prof'l Responsibility 8.4 (2017)

of fraud by omissions, there is a duty to disclose. See *Restatement Second, Torts* §§ 537 et seq. (regarding justifiable reliance); *Nelson v. Gas Research Institute*, 121 P.3d 340 (Colo. App 2005); and *In re Palm Beach Fin. Partners, L.P.*, 517 B.R. 310, 334-35 (S.D. Bankr. Fla. 2013) (regarding fraud by omission). INTA's proposal ensures that the rules of professional conduct cannot be used to support a claim (i) of justifiable reliance on a misrepresentation made in the course of Covert Activity, or (ii) that there exists a duty to disclose information necessary to dispel a misrepresentation made in the course of Covert Activity.

We urge you to consider adopting INTA's proposed rule modifications to permit ethical pretext investigations in Colorado.

Thank you for allowing INTA to comment on Colorado's proposed rule change. We appreciate this opportunity to present our views. If you have any questions or comments regarding INTA's proposals on this topic, please contact Ms. Iris Gunther, INTA Advisor, Enforcement at igunther@inta.org.

Sincerely yours,



Etienne Sanz de Acedo
Chief Executive Officer
International Trademark Association

Enclosure

INTA Proposed Variations to ABA Model Rules of Professional Conduct

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others

Subject to Rule 8.4(b), ~~I~~in the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment to Rule 4.1

In addition to paragraphs 8.4(a)(1), (3) and (4), the Oregon Rules expressly supersede Rule 3.3(a)(1) (Candor Toward The Tribunal). This may have been a scrivener's error in the Oregon Rules in that they were intended to apply paragraph 4.1 (Truthfulness in Statements to Others). See also comment to paragraph 8.4(a)(3).

Transactions With Persons Other Than Clients
Rule 4.2 Communication With Person Represented By Counsel

~~In~~ Subject to Rule 8.4(b), in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment to Rule 4.2

The modifications to the Model Rules of Professional Conduct vary from the Oregon Rules of Professional Conduct in that the definition of "Covert Activity" (see Rule 8.4(b)) has been expressly limited to conduct that is intended to obtain *non-privileged* information. The modification to Rule 4.2 clarifies that such Covert Activity does not constitute professional misconduct even if the third party is otherwise represented by counsel.

Transactions With Persons Other Than Clients
Rule 4.3 Dealing With Unrepresented Person

~~In~~ Subject to Rule 8.4(b), in dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer

shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment to Rule 4.3

As with the modification to Rule 4.2, the modification to Rule 4.3 clarifies that in conducting Covert Activity (defined in Rule 8.4(b)), the Rules of Professional Conduct do not create a duty to disclose information that might undermine the Covert Activity.

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct

(a) It is professional misconduct for a lawyer to:

(~~a~~1) subject to Rule 8.4(b), 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;

(~~b~~2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(~~c~~3) subject to Rule 8.4(b), engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(~~d~~4) subject to Rule 8.4(b), engage in conduct that is prejudicial to the administration of justice;

(~~e~~5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(~~f~~6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(~~g~~7) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

(b) Notwithstanding paragraphs 8.4(a)(1), (3) and (4) and Rules 4.1, 4.2 and 4.3, it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise Covert Activity in the investigation and determination of intellectual property rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert Activity," as used in these Rules of Professional Conduct, means an otherwise lawful effort

intended to obtain non-privileged information about and/or evidence in the investigation and determination of intellectual property rights through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when 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.

Comment to 8.4(b).

Generally.

Rule 8.4(b) is based on the comparable section of the Oregon Rules of Professional Conduct (the "Oregon Rules"). The Oregon rules have contained such a provision permitting "Covert Activity" since at least 2003. See *Oregon Code of Professional Responsibility*, DR 1-102(D) (2003).

Rules 4.1 and 8.4(a)(3)

Rules 4.1 and 8.4(a)(3) restrict an attorney's ability to commit or participate in the commission of a fraud. The modifications to the Model Rules of Professional Conduct expressly exclude "Covert Activity" from such restrictions. In doing so, the modifications deviate from the Oregon Rules of Professional Conduct definition of "Covert Activity" by expressly limiting it to "otherwise lawful" conduct. We note that the elements of fraud vary substantially throughout the United States. In some states there are as many as eleven elements while in other states there are as few as three. See Yost v. Millhouse, 37 N.W.2d 826, 829 (Minn. Ct. App. 1985) (listing 11 elements) and Lengyel v. Lint, 167 W. Va. 272, 280 (1981) (listing 3 elements). Given the breadth of such variation, the inclusion of the phrase "otherwise lawful" is intended to ensure that misrepresentations made in furtherance of Covert Activity should not, in and of themselves, constitute professional misconduct, and that Covert Activity which, independent of such misrepresentations, would be otherwise fraudulent or unlawful is not made ethically permissible by paragraph 8.4(b). Additionally, in certain jurisdictions, whether a misrepresentation is considered to be fraudulent is determined, in part, by whether a third party's reliance on the misrepresentation is justifiable and whether, in the case of fraud by omissions, there is a duty to disclose. See Restatement Second, Torts §§ 537 et seq. (regarding justifiable reliance) and In re Palm Beach Fin. Partners, L.P., 517 B.R. 310, 334-35 (S.D. Bankr. Fla. 2013) (regarding fraud by omission). By expressly making rules 4.1, 4.2, 4.3 and 8.4(a)(1), (3) and (4) subject to paragraph 8.4(b), the rules of professional conduct should not be construed to either (a) justify third party reliance on misrepresentations made in the conduct of such Covert Activity or (b) create a duty to disclose information that might undermine the Covert Activity.

Rule 8.4(a)(1)

Rule 8.4(b) expressly allows attorneys to supervise third parties (e.g., private investigators) in the conduct of Covert Activity. The modification to Rule 8.4(a)(1) ensures that such supervision will not constitute a violation of Rule 8.4(a)(1).

Rule 8.4(a)(3)

See comment on Rules 4.1 and 8.4(a)(3) above.

Rule 8.4(a)(4)

Rule 8.4(a)(4) prohibits attorneys from engaging in conduct that is prejudicial to the administration of justice. By expressly excluding "Covert Activity" from such prohibitions, the modifications to the Model Rules of Professional Conduct to recognize that Covert Activity conducted within the limits described in paragraph 8.4(b) is not prejudicial to the administration of justice, but rather, is in furtherance of the administration of justice..

Docs#2589422-v7

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September 5, 2017

Via Electronic Mail and Hand Delivery

Colorado Supreme Court
c/o Cheryl Stevens
cheryl.stevens@judicial.state.co.us
Chief Deputy Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Support of Proposed Amendment to R.P.C. 8.4(c) on Behalf of the Intellectual Property Section of the Colorado Bar Association

Dear Chief Justice Rice and Fellow Justices:

On behalf of the Intellectual Property Section ("IP Section") of the Colorado Bar Association,[1] I write to provide ***support for the proposed amendment to Rule 8.4(c)*** of the Colorado Rules of Professional Conduct.

I also attach as Exhibit A a list of law firms and IP attorneys who have authorized me to identify them as supporting the proposed amendment to Rule 8.4(c).

In its current form, CRCP Rule 8.4(c) prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." CRCP Rule 5.3(c) further states that "[w]ith respect to nonlawyers employed or retained by or associated with a lawyer … a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if … the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." As currently drafted, these and other Rules of Professional Conduct may be interpreted to prohibit otherwise lawful activities that are important not only to investigate whether IP rights (including patents, trademarks, and copyrights) are being infringed, but also to conduct IP-related investigations, such as legally required pre-suit investigations, as required by state and federal rules.

To satisfy prefiling obligations and initiate effective actions to enforce intellectual property rights, IP attorneys often need to obtain samples of allegedly infringing products in order to examine and analyze them, ascertain the source of allegedly infringing products and/or methods, and determine the manner in which allegedly infringing products and/or methods are made or used. For example, in the case of counterfeit goods, before or after commencing an action against an Internet infringer or counterfeiter, a brand owner may hire private investigators to contact the online seller, exchange communication with the seller and purchase infringing or

[1] This letter reflects the position of the IP Section of the Colorado Bar Association, not the views of the Colorado Bar Association in its entirety.

counterfeit goods to ultimately identify the seller and ascertain his or her domicile to understand the scope of use of the protected trademark. These investigations are important because for many types of IP rights violations, the only manner by which a property owner can adequately protect its investment in its intellectual property and avoid diluting such rights is to bring a swift enforcement action. In addition, IP attorneys may need to use investigators in non-adversarial situations. For example, trademark attorneys often use investigators to contact companies to confirm that marks are no longer in use—perhaps by calling a customer service line.

As it currently stands without amendment, Rule 8.4(c) may have the unintended effect of materially hampering the protection of intellectual property rights and decreasing the economic value of intellectual property.

For these and similar reasons, the IP Section and its membership have been focused on education about and guidance concerning Rule 8.4(c) for a significant period of time. In April 2010, the IP Section held a CLE panel event entitled "Using Deception in IP Related-Investigations: Are You Unwittingly Violating The Colorado Rules of Professional Conduct." Later that year, in October 2010, the IP Section Leadership formally requested guidance concerning Rule 8.4(c) from Colorado Supreme Court Standing Committee on Rules of Professional Conduct. The IP Section's request led to the extensive work and reports of the Standing Committee and the Subtexting Subcommittee. In December 2012, the IP Section sought to educate its members and other attorneys through a CLE panel event on the result of the Subtexting Subcommittee's work, featuring several of Subcommittee members, entitled, "Pretexting, *Pautler*, and the Colorado Rules of Professional Conduct." Finally, the issue and the IP Section's efforts were documented in a June 2014 article in the Colorado Lawyer, entitled "Pretext Investigations: An Ethical Dilemma for IP Attorneys," by Rachel L. Carnaggio (attached as Exhibit B).

Consistent with the IP Section's prior positions—as well as the 2012 majority recommendation in the Supplemental Report of the Pretexting Subcommittee of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct—the IP Section supports the proposed clarifying amendment, which adds a limited exception to Rule 8.4(c), such that it reads:

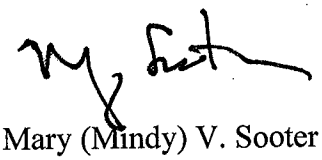
> It is professional misconduct for a lawyer to … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities[.]

The IP Section supports this proposed clarifying amendment for several reasons, including the following. First, the proposed exception provides understandable guidelines for intellectual property attorneys to follow when engaging in presuit investigations. Second, the proposed exception continues to prevent otherwise unlawful activities. Third, the exception allows intellectual property attorneys to use agents, such as professional investigators, to obtain

background, identification, purpose, or similar information. Fourth, it permits attorneys' involvement in presuit investigation, such that attorneys can assist in ensuring that those investigations are lawful.

We appreciate your attention to this important matter and to these comments.

Best regards,



Mary (Mindy) V. Sooter

Chair, IP Section of the Colorado Bar Association

EXHIBIT A

Law Firms

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Merchant & Gould P.C.
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303.357.1670

Sheridan Ross P.C.
1560 Broadway, Suite 1200
Denver, CO 80202
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Sherman & Howard LLC
633 Seventeenth Street, Suite 3000
Denver, CO 80202
303.297.2900

Swanson & Bratschun, LLC
8210 Southpark Terrace
Littleton, CO 80120
303.268.0066

Individuals

Name	Corporation / Firm*
Andrea Anderson	Holland & Hart
Gene Bernard	Greenburg Traurig
Regina Drexler	Ireland Stapleton
Paul Dunlap	Corporate Patent Counsel, Gates Corporation
Ben Fernandez	WilmerHale
Thomas Franklin	Kilpatrick Townsend & Stockton
Charles Gray	Kilpatrick Townsend & Stockton
Natalie Hanlon Leh	Former Chair of the IP Section of the Colorado Bar Association WilmerHale Denver
Matthew Holohan	Secretary, Treasurer of the IP Section of the Colorado Bar Association Kilpatrick Townsend & Stockton
Judith Keene	Holzer Patel
John Kennedy	Wash Park IP
Beth Magnussen	Vice Chair of the IP Section of the Colorado Bar Association

Scott McMillan	Kilpatrick Townsend & Stockton
Jyoti Pandya	Pandya Law
James Poole	Kilpatrick Townsend & Stockton
John Posthumous	Former Chair of the IP Section of the Colorado Bar Association Sheridan Ross
Kristopher Reed	Kilpatrick Townsend & Stockton
Evan Rothstein	Brownstein Hyatt Farber Schreck
Tim Reynolds	Bryan Cave
Karam Saab	Kilpatrick Townsend & Stockton
Jim Sawtelle	Sherman & Howard
Mary (Mindy) Sooter	Chair of the IP Section of the Colorado Bar Association Wilmer Cutler Pickering Hale & Dorr
David Stephenson	Dittavong & Steiner
Jon Tandler	Sherman & Howard
John Wahl	Greenburg Traurig

* The support of the listed individual reflects their own views, and does not reflect the views of the firm or organization with which the individual is associated.

The Colorado Lawyer
The Official Publication of the Colorado Bar Association

June 2014 I Vol. 43, No. 6 I Page 41

Articles
Intellectual Property Law

Pretext Investigations: An Ethical Dilemma for IP Attorneys

by Rachel L. Carnaggio

Intellectual Property Law articles are sponsored by the CBA Intellectual Property Section. They provide information of interest to intellectual property attorneys who advise clients on protecting and exploiting various forms of intellectual property in the marketplace.

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About the Author

Rachel L. Carnaggio is a registered patent attorney engaged in patent and trademark prosecution and portfolio management with the intellectual property law firm HolzerIPLaw, PC—(720) 204-3234, rcarnaggio@holzeriplaw.com.

This article addresses the existing ethical dilemma for a Colorado attorney involved in misrepresentation or nondisclosure when gathering pre-filing evidence in compliance with Rule 11. Such conduct may violate the Colorado Rules of Professional Conduct and calls for definitive guidance.

The Colorado Rules of Professional Conduct (Rules) place limitations on pretexting (covert investigations) for intellectual property (IP) attorneys, as well as for attorneys in other practice areas. A pretexting subcommittee of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct proposed rule changes to the Standing Committee in an effort to provide guidance in pretexting. The Standing Committee voted against recommending any amendments; however, it voted in favor of submitting the subcommittee's research and reports to the Court, where they have waited for more than a year for review. This article summarizes the existing quandary for IP attorneys, how Colorado and other jurisdictions have addressed pretexting, and the pretexting subcommittee's efforts.

The Ethical Dilemma

Pretext investigations generally involve nondisclosure or misrepresentation to a suspected wrongdoer to obtain evidence that cannot be obtained by other means. To comply with Rule 11 and the heightened pleading standard set forth in *Ashcroft v. Iqbal*[1] and *Bell Atlantic Corp. v. Twombly*,[2] misrepresentation or nondisclosure in certain pre-filing investigations may be essential. However, Rule 8.4(c) prohibits attorney involvement in "dishonesty, fraud, deceit, or misrepresentation." Because there are no Colorado attorney disciplinary cases to guide a private lawyer's involvement in pretexting in pre-filing investigations, an ethical dilemma arises for attorneys advising clients or engaging investigators. In some cases, a lawyer considering a pretexting investigation must weigh zealous client advocacy and compliance with Rule 11 against compliance with Rule 8.4 at the potential expense of the client.

IP Cases

When one thinks of a covert investigation, some examples that come to mind include undercover operations in law enforcement or use of testers in discrimination cases. However, pretext investigations may be necessary in IP cases. This is why the CBA IP Section approached the Colorado Supreme Court Standing Committee with concerns about attorney involvement in the practice of pretexting.

In IP practice, attorneys sometimes investigate potentially unfair business practices by use of an undercover agent posing as a member of the general public engaging in ordinary business transactions with a suspected infringer. Such investigatory tactics are specifically illustrated in *Apple Corps Ltd., MPL v. Int'l Collectors Soc'y*.[3] The plaintiffs in *Apple* sued to enjoin a marketer and distributor of collectors' stamps from selling postage stamps featuring copyrighted images of The Beatles.[4] A consent order enjoined sale of some stamps but allowed sale of stamps featuring John Lennon's name and image pursuant to a licensing agreement.[5] The plaintiffs could determine compliance with the consent order only by having investigators directly call a hotline that required a specific club membership, pose as consumers, and order the enjoined stamps.[6] Had the investigators disclosed their identity and reason for calling, they would not have been able to determine the ordinary course of business practice of the defendants.

Similarly, in *Gidatex v. Campaniello Imports, Ltd*.,[7] a trademark infringement and unfair competition case, plaintiff's counsel had to hire investigators to pose as interior designers to prove that defendants were luring customers with signs and ads bearing plaintiff's "Seporiti Italia" trademark.[8] Defendants' showrooms and warehouses were open only to "the trade." As the court pointed out, "It would be difficult, if not impossible, to prove a theory of 'palming off' without the ability to record oral sales representations made to consumers."[9]

As shown in these cases, verification of infringement may require direct contact with a target that would not sell the product to someone acting on behalf of the competitor. Accordingly, the IP attorney may be forced to hire an investigator who conceals his or her identity and reason for purchasing a product to obtain the necessary pre-filing evidence to comply with Rule 11.

Acts of misrepresentation or dishonesty, even by a third party, sound the ethics alarm. In particular, Rule 8.4(c) places restrictions on such case preparation by prohibiting attorney involvement in "dishonesty, fraud, deceit or misrepresentation." Faced with limitations on meeting evidentiary and procedural burdens, a Colorado IP attorney is at a disadvantage. Ultimately, these restrictions can diminish the value of a client's IP portfolio.

Recognizing that pretexting may be a necessary investigatory tool in the IP practice, the IP Section sought clarity from the Colorado Supreme Court Standing Committee as to whether such nondisclosure or misrepresentation constitutes ethical violations.

The **In re Pautler** *Opinion*

The IP Section's inquiry gave rise to the formation of a pretexting subcommittee.[10] The objective of the pretexting subcommittee was to analyze the impact of the Rules of Professional Conduct—specifically Rules 4.1, 4.2, 4.3, 5.3, and 8.4(c)—on the practice of pretexting. Early in its deliberations, the subcommittee expressed concern over the Colorado Supreme Court's position in *In re Pautler*,[11] which addresses attorney involvement in deceptive conduct. The *Pautler* case involved direct misrepresentation by a district attorney to an alleged murder suspect. The Court in *Pautler* affirmed a ruling that the district attorney had violated Rules 4.3 and 8.4(c) when he posed as a public defender to persuade the suspect to surrender.[12]

Even though the district attorney had good reason for his misrepresentation, the Court professed its concern for the reputation of the legal profession and denounced any practices involving deceptive conduct. The Court declared, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so."[13]

Although the Court in *Pautler* focused on the direct action taken by the district attorney, it also suggested that any attorney involvement in deceptive practices is prohibited.[14] For the IP attorney, this broad interpretation of the rule implicates indirect involvement in an investigation to obtain evidence of infringement. For more insight into how to address pretexting, the subcommittee looked to other jurisdictions.

Pretexting in Other Jurisdictions

Most jurisdictions have yet to address the ethical questions surrounding pretexting. The subcommittee identified seventeen jurisdictions where the respective bars have addressed the issue in amendments to the jurisdiction's rules of professional conduct, comments to the rules, or ethics opinions (collectively, bar rules).[15] In addition, the courts in a handful of jurisdictions have addressed pretexting in court opinions. However, the bar rules and court opinions provide no uniformity in their conclusions.

Bar Rules

Although most states that have addressed the issue do not permit direct participation, some permit advisement by either all attorneys (Michigan, North Dakota, Oregon, Virginia, and Wisconsin) or government attorneys only (Alabama, Missouri, and Florida).[16] At least ten states have a rule, a comment, or an ethics opinion suggesting that all attorneys may at least supervise pretext investigations.[17] Another six states (the District of Columbia, Florida, Missouri, South Carolina, Tennessee, and Utah) have a rule, comment, or ethics opinion reaching the conclusion that government attorneys may at least supervise pretext investigations.[18] Some states limit attorney participation in pretexting to "lawful investigative activities," investigations "authorized by law," "lawful intelligence-gathering activity," or by providing that Rule 8.4(c) is not violated unless the misrepresentation "reflects adversely on the lawyer's fitness to practice law.[19]

New York has an ethics opinion permitting "dissemblance" in a small number of exceptional circumstances. These include the investigation of IP rights violations where dissemblance is limited to identity and purpose and involves lawful activity undertaken solely for gathering evidence.[20]

Similar to the New York ethics opinion, and specific to IP infringement, an Alabama ethics opinion permits use of an undercover investigator during pre-litigation investigation.[21] Such investigators may pose as customers under the pretext of seeking products or services of the suspected infringers and may misrepresent their identity and purpose, as long as contact with suspected infringers occurs in the same manner and on the same basis as a member of the general public.[22]

Court Opinions

Courts in other jurisdictions have primarily focused on the type of information gathered and what level of communication takes place to determine whether pretexting constitutes ethical violations. However, "there is a discernible continuum in the cases from clearly impermissible to clearly permissible conduct."[23] Fortunately for the IP lawyer, courts have permitted pretexting conduct in the small number of IP cases they have addressed.

Courts generally permit pretext investigations when communications involve an ordinary course of business transaction. For example, in *Apple Corps*, the U.S. District Court for the District of New Jersey found that: (1) New Jersey RPC 4.2 cannot apply where lawyers and/or their investigators act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation; (2) New Jersey RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes; and (3) the prohibitions of New Jersey RPC 4.3 do not apply to straightforward transactions undertaken solely to determine, in accordance with Rule 11, the existence of a well-founded claim.[24]

The U.S. District Court for the Southern District of New York in *Gidatex* found no violation because the investigators merely interacted with low-level employees without access to attorney–client privileged information and recorded the normal business routine in the showroom and warehouse).[25] Other courts have found ethical violations when the investigations involve trickery, similar to *Pautler*.[26] For example, in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, the U.S. District Court for the District of South Dakota found that audio recording a salesperson without his knowledge constituted an act of trickery and ethical violations.[27] In the case *In re Gatti*, the Oregon Supreme Court found ethical violations when an attorney posed as a chiropractor to elicit statements evidencing fraud.[28]

The Reports

The arduous research efforts of the pretexting subcommittee resulted in two reports, a Final Report and a Supplemental Report, which include proposed exceptions to Rule 8.4(c) to allow pretext investigations. The accompanying table illustrates the current language of Rule 8.4(c), as well as proposed exceptions to the Rule contained in the reports.

Current Rule 8.4(c) and Proposed Exceptions	
Existing Rule 8.4	Rule 8.4

	It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]
Final Report, Initial Proposed Exception, rejected by the Standing Committee	Rule 8.4 It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *when either;* *(1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (b) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or* *(2)(A) the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering*[.]
Supplemental Report, Majority's Proposed Exception, submitted for review to the Court	Rule 8.4 It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*[.]
Supplemental Report, Minority's Proposed Exception, submitted for review to the Court	Rule 8.4 It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer representing the government may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*[.]
Supplemental Report, Minority's Alternative Proposed Exception, submitted for review to the Court	Take no further action.

The Final Report, presented at a January 6, 2012 Standing Committee meeting, includes a single proposed exception to Rule 8.4(c) to permit attorney involvement in pretext investigations. The exception would allow attorneys to direct, advise, or supervise lawful covert activity involving misrepresentation or deceit in specific, detailed circumstances. The Standing Committee rejected the proposal, but asked the subcommittee to study the issue further and solicit input from stakeholders, specifically members of the bar and clients wanting to protect their intellectual property.

The subcommittee drafted a Supplemental Report, which involved consideration of stakeholders' comments[29] to the initial proposal, making Comment or other Rule changes, as well as including in-depth research and discussion.[30] The Supplemental Report includes a revised, simpler exception proposed by the majority, and two alternatives proposed by two minority members who urge that the majority's revised exception is still too broad.

The Majority's Revised Proposed Amendment to Rule 8.4(c)

The majority's revised proposed exception applies only to lawful investigative activities and permits a lawyer to advise, direct, or supervise the activities. The majority excludes direct participation but permits some level of attorney involvement to allow an attorney to oversee an investigation, decreasing the risk of any unlawful conduct. The majority believed that increasing the likelihood of lawful activities protects the public perception of the profession (the leading concern of the *Pautler* Court). The majority's purpose of limiting the proposed exception to "investigative activities" is to exclude noninvestigatory cases most commonly implicating Rule 8.4(c)—for example, when attorneys lie to their clients or misuse client funds.

The subcommittee urges that the most compelling reason for a Colorado-specific rule is the uncertainty resulting from Colorado precedent in the *Pautler* case.[31] *Dicta* in *Pautler* suggest that any involvement in misrepresentation is categorically prohibited, but also suggests that this categorical prohibition may not apply to indirect involvement with covert investigations.[32]

The Minority's Proposal

With a primary focus on the integrity and reputation of the profession, the two-member minority proposed either: (1) a narrower Rule 8.4(c) exception (for a lawyer representing the government only); or (2) no amendment.

The first alternative. The minority would limit the exception to "a lawyer representing the government," thus excluding public defenders and private attorneys.[33] Although deception is not condoned, the minority recognizes that case law and CBA Ethics Committee Formal Opinion 112 imply that law enforcement officers may dissemble.[34] Courts have recognized that ruses are a sometimes necessary element of police work.[35]

The minority departs from the majority because it believes that a civil lawyer involved in lawful pretexting diminishes the profession by instigating investigator dishonesty.[36] The minority also fears that potential abuse in certain civil practice areas (ones involving animosity, such as dissolution of marriage cases) harms the integrity of the profession.[37]

The second alternative. As an alternative option, the minority proposed that the Court take no action. The minority agrees that lawyers are entitled to more guidance as to pretexting, but fears an amendment could weaken the reputation of attorneys and raises a policy issue:

> The public persona of lawyers is already relatively poor, and we are concerned that an amendment that specifically allows a lawyer to direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit will only make this worse.[38]

The minority emphasizes there is no way to verify that enabling lawyers to supervise and advise investigations would reduce potential for improper conduct, as the majority suggests. The minority also reiterates that despite the majority's requirement that such activity must be lawful, the ultimate issue should be dishonesty, not legality.[39] If the broadest language in *Pautler* applies to all supervision of pretext investigations, the minority warns that a proposed change to Rule 8.4(c) could be characterized as a calculated retreat from holding lawyers to the highest standard of honesty.[40]

The Standing Committee

At the July 13, 2012 meeting, the Standing Committee met with the subcommittee and other interested parties to discuss the Supplemental Report. Following presentations of the proposals, the Standing Committee had close votes on the following: the majority's proposal, the minority's first alternative, the minority's second alternative, and a proposal to develop a Comment. Only the minority's second alternative (make no changes) was successful. However, the Standing Committee adopted a motion to provide minutes from all the meetings and the subcommittee's Final Report and Supplemental Report to the Court for review.

Advocates for Change

As reflected in the subcommittee's proposals, most stakeholders advocate for an exception to the Rule. For private attorneys, pretext investigations may be the only way to evidence illegal deception or fraud, such as trademark counterfeiting or housing discrimination.[41] Specific to IP practice, stakeholders believe change is warranted because Rule 8.4(c) may prevent appropriate pre-filing investigation.

As one stakeholder points out, "Rule 8.4(c) may have the unintended effects of materially hampering the protection of intellectual property rights and decreasing the value of intellectual property."[42] Another stakeholder warns:

> [T]he consequence of rejecting a limited amendment will not [be to] render such investigations unlawful but it will prevent organizations from employing their attorneys in an oversight role to help ensure that such investigations are conducted in a lawful and ethical manner.[43]

In addition to fears of diminishing the reputation of the profession, stakeholder opposition to proposed amendments includes concern over dissimilarity with the ABA Model Rules. However, the Standing Committee has recommended and the Court has adopted several rule changes over the past several years. Although uniformity among the state Bars is favored, there are exceptions, such as when

Colorado law or public policy (for example, enforcing IP rights) justifies departure, or if the Standing Committee recommends a better rule.

Despite such input from stakeholders, the Supreme Court has not taken steps to review the work product submitted from the Standing Committee. Recently, the U.S. District Court for the District of Colorado reviewed alleged acts of professional misconduct in a pretexting matter, but provided no direct guidance. In *FTC v. Dalbey*, the defendants alleged improper conduct by FTC counsel when an FTC investigator, under the direction of counsel, posed as a prospective customer, calling employees of the defendants and surreptitiously recording conversations.[44] The defendants alleged such practice was contrary to Ethics Opinion 112, in which the Committee interpreted Rule 8.4(c) and Rule 5.3 to apply to surreptitious recordings.[45] The Court found the FTC counsel, who was licensed in jurisdictions authorizing undercover calls, had a good faith (but false) belief that the conduct was authorized.[46] Also, the Court determined there was lack of prejudice because the calls were not used in summary judgment papers.[47] In conclusion, the Court declined to issue sanctions and recommended that defendants report suspected ethical violations to the Office of Attorney Regulation Counsel, an "appropriate forum to determine whether an ethical breach has occurred and, if so, what sanction should be imposed."[48]

Conclusion

In light of the *Pautler* opinion, the language of Rule 8.4(c), lack of applicable case law, and demand for attorney involvement in pretexting, the prevailing consensus is that attorneys would benefit from rules that provide clear guidance for their conduct. However, there is little indication if and when the Colorado Supreme Court will attempt to resolve the ethical uncertainties raised by pretext investigations.

For now, there are competing positions that the Colorado IP attorney contemplating a pre-filing investigation should consider. On the one hand, as supporters for Rule amendments argue, attorney involvement may improve accountability and decrease unlawful conduct. On the other hand, those in opposition to the rule amendments fear abuse by attorneys, as well as a declaration from the Court to the public condoning deceptive conduct by lawyers.

Although attorneys share a common goal of promoting the image of the bar and adhering to the highest ethical standards, pretexting may be necessary as an investigatory tool to best advocate for a client. Until case law develops or rule modifications occur, the Colorado IP attorney may be left choosing between upholding the reputation of the profession or effective client advocacy and ultimately risking potential sanction.

Notes

1. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

2. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

3. *Apple Corps Ltd., MPL v. Int'l Collectors Soc'y*, 15 F.Supp.2d 456 (D.N.J. 1998).

4. *Id.*

5. *Id*. at 460.

6. *Id.* (The investigators included plaintiffs' counsel, her secretary, her co-counsel's stepson, and an associate's husband.)

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

8. *Id.* at 124.

9. *Id*.

10. The pretexting subcommittee members of the Colorado Supreme Court Standing Committee included Tom Downey (chair), H. Berkman, J. Haried, M. Hirsch, A. Rocque, A. Rothrock, A. Scoville, D. Stark, J. Sudler, J. Webb, and J. Zavislan.

11. *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002) (sanctioning deputy district attorney for misrepresenting that he was a public defender to a barricaded and armed murder suspect in the context of surrender negotiations).

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Downey *et al.*, Supplemental Report of the Pretexting Subcommittee, www.cobar.org/repository/Inside_Bar/FamilyLaw/FLS%202%20pretext%20subcom.pdf at Attachment B (reporting deviation from ABA Model Rules of Professional Conduct in Alabama, Alaska, the District of Columbia, Florida, Iowa, Michigan, Missouri, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Utah, Virginia, and Wisconsin).

16. *See id.* at 8 and Attachment B.

17. *Id.*

18. *Id*. at 8.

19. *Id*. at 7.

20. *See* New York County Op. 737 (May 23, 2007).

21. *See* Alabama Ethics Opinion RO-2007-05 (adopting the rationale and holdings of *Apple*, 15 F.Supp.2d 456 and *Gidatex*, 82 F.Supp.2d 119).

22. *Id.*

23. *See Hill v. Shell Oil Co.*, 209 F.Supp.2d 876, 880 (N.D.Ill. 2002).

24. *Apple Corps*, 15 F.Supp.2d at 474-76.

25. *Gidatex*, 82 F.Supp.2d at 122.

26. *Pautler*, 47 P.3d at 1183.

27. *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp.2d 1147, 1155-60 (D.S.D. 2001).

28. *In re Gatti*, 8 P.3d 966, 976 (Or. 2000).

29. The stakeholders that submitted comments include the Attorney General of Colorado; Colorado Criminal Defense Bar; Colorado District Attorney's Council; CBA Family Law Section; CBA Intellectual Property Section; International Trademark Association; Marksmen; Office of the Federal Public Defender, Districts of Colorado and Wyoming; Office of the State Public Defender; Oracle Corporation; RE/MAX, LLC; Standing Committee of the Criminal Justice Act Panel, U.S. District Court for the District of Colorado; State of Colorado, Office of the Alternate Defense Counsel; and U.S. Department of Justice, U.S. Attorney, District of Colorado.

30. *See* Downey, *supra* note 15.

31. *Id.*

32. *Compare Paulter*, 479 P.3d at 1182 *with id.* at 1179 and n.4.

33. *See* Missouri Rule 8.4(c) (recently amended to include an exception for a lawyer "for a criminal law enforcement agency, regulatory agency, or state attorney general," who may "advise others about" or "supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations").

34. *See* Downey, *supra* note 15 at 32.

35. *People v. Zamora*, 940 P.2d 939, 942 (Colo.App. 1996).

36. *See* Downey, *supra* note 15 at 35.

37. *Id.* at 36.

38. *Id.* at 37-38 and CBA Family Law Section Comment. *See also Pautler*, 47 P.3d at 1175:

> Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession—as well as at the heart of the system of justice.

39. *See* Downey, *supra* note 15 at 38.

40. *See id.* at 40.

41. *See id.* at 29, INTA Comment ("[S]uch investigations may be used to gather evidence not otherwise discoverable. . . .").

42. *Id.* at CBA Intellectual Property Law Section Comment at 2.

43. *Id.* at RE/MAX Comment at 2.

44. *FTC v. Dalbey*, 2013 WL 941821 (D.Colo. 2013).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Back

U.S. DEPARTMENT OF JUSTICE

Robert C. Troyer

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September 1, 2017

The Colorado Supreme Court
c/o Cheryl Stevens, Acting Clerk
2 East 14th Avenue
Denver, CO 80203

Dear Honorable Justices,

I have enclosed a letter supporting the pending, proposed change to Rule 8.4(c) of the Colorado Rules of Professional Conduct. I am also writing to request that the Deputy United States Attorney, Matthew Kirsch, be allowed to participate in the September 14, 2017 hearing on the proposed rule change. If permitted, Mr. Kirsch would testify or speak in support of the proposed change.

Thank you for considering the enclosed letter and my request for Mr. Kirsch to participate in the hearing.

Very truly yours,

ROBERT C. TROYER
Acting United States Attorney

Enclosure

U.S. DEPARTMENT OF JUSTICE

Robert C. Troyer

Acting United States Attorney
District of Colorado

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September 1, 2017

The Colorado Supreme Court
c/o Cheryl Stevens, Acting Clerk
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Denver, CO 80203

Dear Honorable Justices,

I write to express my office's strong support for the pending, proposed change to Rule 8.4(c) of the Colorado Rules of Professional Conduct. The proposed amendment is consistent with courts' longstanding recognition that law enforcement agents or cooperating informants are permitted to engage in subterfuge during investigations in order to effectively protect the public.[1] The amendment would also eliminate the conflict between this public interest and the Office of Attorney Regulation Counsel's (OARC) current position that a government attorney could violate Rule 8.4(c), as currently written, by providing advice, direction, or supervision to investigative agents about using law enforcement techniques that rely on some element of misrepresentation. Finally, the proposed amendment would align Colorado with both the modern trend and the significant weight of authority in other jurisdictions that have adopted, through their rules, comments, case law, or ethics opinions, a similar exception when applying their equivalents of Rule 8.4(c) (and sometimes their Rule 4.l(a) equivalents) to permit government attorneys to provide this kind of advice, direction, and supervision in the service of lawful and effective law enforcement. Because I know that the Colorado Attorney General has separately provided a list of these authorities in Addendum A to her letter supporting the rule change, I have not included them here. My office, like the Attorney General's, is unaware of any case outside of Colorado in which a government attorney has faced the possibility of discipline solely based on supervising or providing advice about otherwise lawful undercover activities.

[1] *See, e.g., Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, Blackmun, JJ., concurring in the judgment) (recognizing that contraband offenses "are so difficult to detect in the absence of undercover Government involvement" and concluding that "[e]nforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity"); *United States v. Russell*, 411 U.S. 423, 432 (1973) (asserting that the infiltration of drug rings, the only practicable means of detecting unlawful conduct, is "a recognized and permissible means of investigation" and "can hardly be said to violate 'fundamental fairness' or 'shocking to the universal sense of justice'"); *Sorrells v. United States*, 287 U.S. 435, 441 (1932) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises."); *United States v. Murphy*, 768 F.2d 1518, 1529 (7th Cir. 1985) ("In the pursuit of crime, the Government is not confined to behavior suitable for the drawing room. It may use decoys and provide the essential tools of the offense.").

United States Department of Justice ("DOJ") prosecutors, civil DOJ attorneys, and other federal government attorneys confer with agents who use a variety of law enforcement investigatory techniques – such as undercover operations, confidential informants, and other covert techniques – that are, or may be regarded as, deceitful. But these techniques are lawful in nature and well established in practice. Because such covert investigative activities often raise difficult and sensitive legal or policy issues, it is vital for government agents to consult DOJ attorneys in conducting these investigative operations. The interests of justice are not served when government attorneys cannot provide advice, direction, or guidance regarding covert law enforcement investigations. *See, e.g., United States v. Salemme*, 91 F. Supp. 2d 141, 188-97 (D. Mass. 1999) (discussing the importance of oversight by the Attorney General of FBI activities, and noting that the FBI is formally subject to the oversight and direction of the Attorney General, 28 U.S.C. §§ 503, 531-33), *rev'd in part on other grounds*, 225 F.3d 78 (1st Cir. 2000). Attorney involvement in investigations is usually required by federal law or DOJ policy and is often critical to proper, lawful, and effective investigation and prosecution. Government attorney involvement is equally important in ensuring that constitutional and other legal rights of investigative targets are protected. Attorneys, usually even more than investigators, are aware that (and motivated by the fact that) violations of targets' rights can result in suppression of evidence or dismissal of charges, even in otherwise meritorious cases.

These investigative techniques, while involving some level of deceit, are lawful and certainly do not reflect adversely on the fitness to practice law of federal government attorneys. For example, the DOJ is charged with protecting the government against the submission to federal agencies of false claims for payment. *See* False Claims Act, 31 U.S.C. §§ 3729 *et seq.* A DOJ attorney may provide guidance or advice to agents or cooperating witnesses in a civil health care fraud investigation that may require the agents or witnesses to pretend to be patients or vendors in order to uncover fraud against the Medicare program. The agent's or witness's pretense necessarily would involve misrepresentation as to his or her identity or the purpose of his or her contact with the health care provider. Under OARC's current interpretation of the existing Colorado Rules 8.4(c) and 4.1(a), however, the DOJ attorney's provision of guidance or advice regarding the investigation might be misconstrued as a violation.

Likewise, both the DOJ and the Department of Housing and Urban Development ("HUD") are responsible for ensuring that people receive equal opportunity in housing and do not suffer discrimination based upon their race, color, religion, sex, national origin, familial status, or handicap. *See* Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. In order to determine whether discrimination is occurring, the DOJ and HUD may engage in "testing" of a housing provider, *i.e.*, sending in cooperative witnesses or government employees to pose as home seekers to discover whether the "testers" are provided the same information and given the same opportunity to purchase or rent regardless of their membership in a protected class.[2] These investigative techniques are essential to enforcing anti-discrimination law. *See Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973) ("[I]t would be difficult indeed to prove discrimination in housing without [using a tester] for gathering evidence."). Again, however,

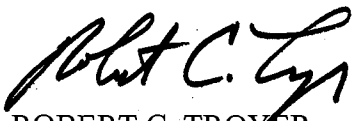
[2] HUD also provides funding through the Fair Housing Initiative Program to fair housing organizations that employ similar tactics to help identify and investigate housing providers suspected of housing discrimination.

under OARC's interpretation of the existing Rule 8.4(c), attorneys providing guidance or advice about such "testing" could be deemed a violation.

The proposed amendment to Rule 8.4(c) would eliminate any argument that a government attorney providing advice, direction, or guidance regarding such investigations is violating the Colorado Rules of Professional Conduct. It would resolve the uncertainty created by the conflict between the well-established policy favoring attorney involvement in investigations and OARC's interpretation of the current version of Rule 8.4(c). The Ethics Advisors and Professional Responsibility Officers in my office routinely receive questions about this topic. During nearly every ethics training session in the office, attorneys raise questions about the propriety of and limits applicable to directing or advising law enforcement agents conducting covert investigations.

There is no justifiable basis for subjecting government attorneys, acting in good faith to ensure lawful and effective covert investigations, to potential discipline under the Colorado Rules of Professional Conduct. Allowing government attorneys to provide advice, direction, or guidance about lawful investigations is not the same thing as saying that attorneys themselves "may deceive or lie or misrepresent," a practice this Court has properly disapproved. *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002). The proposed amendment to Rule 8.4(c) appropriately recognizes the beneficial role government attorneys play in covert investigations. It eliminates the possibility of discipline for attorneys playing this lawful role while honoring *Pautler*'s recognition of the importance of attorney integrity. This Court should adopt the proposed amendment.

Very truly yours,



ROBERT C. TROYER
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September 5, 2017

The Colorado Supreme Court
c/o Cheryl Stevens, Acting Clerk
2 East 14th Avenue
Denver, CO 80203

Dear Honorable Justices,

Thank you for the opportunity to comment on the proposed amendment to Colorado Rule of Professional Conduct 8.4(c) ("Rule 8.4(c)"). I wish to express my office's strong support for the amendment. I have reviewed the comments submitted by both the Colorado Attorney General and the United States Attorney for the District of Colorado; I concur with their arguments in support of the proposed amendment. I write to raise how amending Rule 8.4(c) will help in the enforcement of anti-discrimination laws, including the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* ("the Act"), by allowing both government and private attorneys to advise on the collection of "testing" evidence—a vital source of evidence in the enforcement of the Act.

The United States Department of Housing and Urban Development ("HUD") is responsible for ensuring that persons are afforded equal opportunity in housing and are not discriminated against based upon their race, color, religion, gender, national origin, familial status, or disability. Since the passage of the Act, discrimination has become more subtle and harder to detect—"discrimination with a smile." In a brief transaction, an ordinary person seeking housing often is unable to detect false representations or subtle shifts in policies a housing provider might make based on a protected class. One of the best ways to combat this problem has been in the development of fair housing tests. A fair housing test is a planned interaction between a housing provider and an individual pretending to be a home-seeker for the purpose of gathering information concerning the manner in which the provider does business. Testing uses cooperative witnesses to discover whether the targeted housing provider provides testers with the same information and gives them the same opportunity to purchase or rent, regardless of their membership in a protected class. This method of gathering evidence to prove allegations of housing discrimination has long been accepted by the courts, up to and including the Supreme Court. *See generally Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Indeed, such evidence can be crucial in the identification of discriminatory practices. The Tenth Circuit has stated that "it would be difficult indeed to prove discrimination in housing without [using a tester] for gathering evidence." *Hamilton v. Miller*, 477 F.2d 908, 909 n.1 (10th Cir. 1973). Testing may be used to investigate potential discrimination in the availability and terms of rental units, pricing for purchase, or terms in mortgage lending. Testing, however, frequently requires some deception on the part of the tester—either as to whether they are actually seeking housing or as to their membership in a protected class.

In enforcing the Act, HUD attorneys within the Office of Counsel may advise, direct, or supervise other employees engaged in "testing" to ensure the legality of these investigations and to protect the admissibility and probative value of the evidence. In addition, HUD's Office of Fair Housing and Equal Opportunity ("FHEO")—the program office charged with investigating alleged violations of the Act—also employs several attorneys in non-attorney capacities who may advise, direct, or supervise other employees engaged in testing. FHEO also provides funding to private organizations through its Fair Housing Initiative Program to identify and investigate claims of discrimination; in Colorado, FHEO provides funding to the Metro Denver Fair Housing Center ("MDFHC") for this purpose. HUD may direct such private organizations to conduct fair housing tests to identify if a housing provider is discriminating in violation of the Act. *See* U.S. Department of Housing and Urban Development, *Title VIII Complaint Intake, Investigation, and Conciliation Handbook 8024.01*, 4-34 to 4-39, *available at* https://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/fheo/80241.

Under the Office of Attorney Regulation Counsel's current position, HUD attorneys (and non-practicing attorneys within FHEO) could violate Rule 8.4(c) by providing direction or guidance to testing investigations. I believe the proposed amendment will allow HUD attorneys to direct, advise, or supervise such investigations free of any concern that they might be violating the Colorado Rules of Professional Conduct. Absent a change to Rule 8.4(c), HUD attorneys must remove themselves from such investigations.

Finally, I specifically note my support for the proposed amendment's inclusion of all attorneys—both government and private—who advise those who participate in "lawful investigative activities" in the exception to Rule 8.4(c). HUD often receives complaints from private organizations like MDFHC who conduct fair housing testing investigations without any prior direction or guidance from HUD. To help guide and strengthen these investigations, these organizations may employ attorneys. HUD relies on the strength of the testing evidence in these complaints to determine whether to charge the housing provider with discrimination. I believe that these testing investigations benefit from the advice that a private attorney can provide, which in turns benefits HUD's enforcement of the Act. As such, I believe that the amendment to Rule 8.4(c) properly extends to all attorneys involved in "lawful investigative activities."

I believe that the proposed amendment to Rule 8.4(c) will strengthen and assist HUD's ability to enforce the Fair Housing Act. As such, I respectfully ask the Court to adopt the proposed amendment.

Sincerely,

Matt Mussetter

Regional Counsel

OFFICE OF THE DISTRICT ATTORNEY

Jefferson and Gilpin Counties

Peter A. Weir, District Attorney

September 5, 2017

Colorado Supreme Court
c/o Cheryl Stevens
Acting Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed rule change to the Colorado Rules of Professional Conduct, Rule 8.4.

Dear Chief Justice Rice and Members of the Court:

I write as the elected District Attorney in the First Judicial District to express support for the proposed rule change to Rule 8.4. The discussion surrounding prosecuting attorneys providing advice during undercover operations is not new to this Court or to the Rules Committee. In 2012 the Rules Committee considered the language now before the Court. The Committee specifically commented that a substantial number of its members agreed that the current text of the rule permits attorneys to advise, direct or supervise others in connection with lawful investigations that might require deceit or misrepresentation. I agree that this type of activity is not, and should not, be considered a violation of the current RPC 8.4. Unfortunately, the efforts of the Rules Committee in 2012 did not result in a proposed rule change for the Court.

However, this issue very significantly impacted my office and me in 2015 when the Attorney Regulation Counsel ("ARC") decided the "facts and circumstances set forth" in an ethics complaint by a criminal defense attorney were sufficient to open an investigation into the complaint, noting the allegations implicated Colo. RPC 5.3 and 8.4(c). This complaint related to the Child Sex Offender Internet Investigations unit (known as "CHEEZO") which had operated

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as part of the District Attorney's Office for twenty years. Facing formal investigation and possible consequences to my professional license to practice law, I felt compelled to cease operation of CHEEZO. Fortunately, after extensive discussions with the Jefferson County Commissioners and the Jefferson County Sheriff's Office, the operations of CHEEZO moved from my office to the Jefferson County Sheriff's Office. This move was made with the understanding that I would continue to pursue avenues to bring this to the attention of the Court. With my agreement to cease the operation of CHEEZO, the ARC dropped the investigation and dismissed the matter. (*See* Exhibit 1, ARC Letter Closing CHEEZO Investigation (Dec. 16, 2016)).

However, the First Judicial District Attorney's Office continues to employ twenty-eight criminal investigators and there remains great uncertainty as to the role these investigators, as employees of the District Attorney's Office, may play in undercover criminal investigations. Additionally, the issue raised in the ethics complaint and the position taken by the Attorney Regulation Counsel also bring into question the larger issue of what role licensed attorneys, including prosecutors, can have in advising and directing law enforcement agencies regarding undercover investigations and covert police tactics.

Online internet investigations began in the First Judicial District Attorney's Office in 1996, in response to the increasing threat posed to children in our community by electronic and internet anonymity. Officially in 2006, the Child Sex Offender Internet Investigations Unit was created and became known as "CHEEZO". Through the direct work of the CHEEZO Unit, the First Judicial District Attorney's Office has achieved over 900 convictions of internet predators. With the official formation of CHEEZO, it was also recognized that to effectively address the risk of online sexual exploitation posed by online anonymity and children's increased internet activity, there needed to be an increase in community education. To promote both the investigative and educational aspects of the CHEEZO Unit, the First Judicial District Attorney's Office employed investigators and an investigative technician. CHEEZO began with only two investigators but with the increase in online sexual predators and educational opportunities the unit grew to three investigators and an investigative technician. Since its formation in 2006, the CHEEZO team of investigators and investigative technicians presented in our community on the topic of internet safety over 2300 times to thousands and thousands of kids.

CHEEZO investigations are online, covert operations. Investigators will enter internet chat forums using an assumed identity of a child under the age of

fifteen and wait for an adult to contact them. If an adult sends a message to a portrayed child and requests inappropriate photographs, videos or meetings, the investigator will develop sufficient information to identify and, if appropriate, arrest the suspect. The offenses typically investigated by CHEEZO include internet luring of a child, a violation of § 18-3-306, C.R.S., and internet sexual exploitation of a child, a violation of § 18-3-405.4, C.R.S. At the conclusion of the investigation, the CHEEZO investigator will present a case filing to the District Attorney's Office for charges – as law enforcement would do in any felony case. These filings are then reviewed following the same procedure as case filings from other law enforcement agencies in the First Judicial District. During the investigations, attorneys in the District Attorney's Office were available to provide general legal advice and direction when asked about a particular investigation. This could include questions about probable cause for arrest and charges, guidance around the use of warrants, and assistance in evaluating the constitutionality of investigative methods. This type of interaction and advice during the investigation was the same direction and legal advice provided to every law enforcement agency in the First Judicial District. Attorneys did not actively participate in the actual undercover investigations.

In considering the Request for Investigation of me, the ARC did not find any impropriety with the way the investigators and support staff conducted their investigations. Similarly, the ARC did not find any impropriety with the manner in which Deputy District Attorneys interacted with the investigators. Rather, the sole focus of the ARC was the fact that the CHEEZO investigators were the employees of the District Attorney's Office. At the conclusion of ARC's review of the Request for Investigation, ARC shared with me that other than their being employees of the District Attorney's Office, the actions of the investigators and my attorneys were entirely appropriate.

Rule 8.4(c) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." Colo. RPC 8.4(c) (2008). This was taken from Rule 8.4(c) of the ABA Model Rules of Professional conduct drafted in 1983 and has been applied in almost every state. ABA-AMRPC Rule 8.4(c) (2007). This rule has been the cause of controversy in many jurisdictions as courts struggle to define the scope of its application. *See* Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 Tex. L. Rev. 381, 386 (2002). Recently, the controversy has been focused around criminal investigations and the role prosecuting attorneys play in carrying them out. Id. There is a substantial body of law that allows law enforcement to use misrepresentation and deceit to carry out criminal investigations. However, Colo. RPC 5.3 provides that a lawyer

shall be vicariously liable for conduct of non-lawyers that are employed with, associated with, or retained by the lawyer that does not conform to the Rules of Professional Conduct if that conduct is ordered or ratified by the lawyer. Colo. RPC 5.3 (2008). If investigations routinely and lawfully involve misrepresentation, and investigators are often working alongside prosecuting attorneys, how far away does a prosecutor have to stand to avoid being "associated" with the investigators or from "ratifying" their conduct? If the investigators are unable to do their job effectively without imputing ethical violations on the attorneys they work for, it could have a debilitating impact on the ability to uncover and prosecute crime.

In response to this concern, some jurisdictions have interpreted RPC 8.4(c) more narrowly in the context of criminal investigations. The Supreme Court of Colorado has not yet had occasion to rule on whether supervising or tasking investigators to conduct undercover operations involving misrepresentation falls within the scope of Colo. RPC 8.4(c) (applied vicariously through Colo. RPC 5.3), but in 2003 the Colorado Bar Association Ethics Committee recognized the need to facilitate cooperation between prosecutors and law enforcement in the interest of carrying out successful criminal investigations and prosecutions. CBA Ethics Comm., Formal Op. 112 (2003) ("In the opinion of the Committee, an attorney may surreptitiously record, and may direct a third party to surreptitiously record conversations or statements for the purpose of gathering admissible evidence in a criminal matter.") The Ethics Committee acknowledged in the advisory opinion that "surreptitious recordings" may involve elements of "trickery and deceit," but felt the exception is nonetheless warranted due to "the widespread historical practice of surreptitious recordings in criminal matters and the belief that attorney involvement in the process will best protect the rights of criminal defendants." Id. Without this cooperation, investigations could easily be compromised, constitutional rights violated, and evidence excluded that would otherwise be admissible had police been able to work under the advice of attorneys.

Relying on the same logic, The United States District Court for the Western District of New York held that DR-1-102(A)(4) (identical predecessor to RPC 8.4(c)) does not bar lawyers from supervising or providing advice to lawful undercover investigations involving misrepresentation and deceit. *United States v. Parker*, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001); N.Y. State Bar Assoc. Ethics Comm., Opinion No. 515 (1979); Assoc. of the Bar of the City of N.Y. Comm. on Professional Ethics, Opinion No. 696, 1993 WL 837936. In *In re Pautler*, the Colorado Supreme Court recognized similar exceptions developed in Utah and Oregon, but did not adopt them at that time because the facts of *Pautler* did not fit

within the exception. *In re Pautler*, 47 P.3d 1175, 1179 (Colo. 2002). *Pautler* involved a personal misrepresentation by an actual Deputy District Attorney that directly affected the rights of a defendant by "tricking" him into surrendering himself. Id. at 1176-78. This is quite distinct from the exception involving attorney association with lawful, but deceptive investigative techniques by non-lawyer investigators in the course of criminal investigations. *Parker*, 165 F. Supp. 2d. at 476.

Although Colorado has not made an official exception for this type of conduct, there is ample support for its application to the circumstances surrounding CHEEZO type investigations. These investigations directly reflect the kind of conduct that the Federal District Court in *Parker*, and other persuasive authorities have found to be outside the scope of RPC 8.4(c). In Ethics Opinion 112, the Colorado Bar Association Ethics Committee considered whether attorneys could direct a non-attorney to surreptitiously record conversations. After reviewing Colorado law, and noting the Supreme Court's silence on the topic, the Committee determined that surreptitious recordings were ethically permissible "in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence." CBA Ethics Comm., Formal Op. 112 (2003) at p. 1. The Committee based its determination on the "widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants." *Id.* (However, the opinion also acknowledges that the Court has not recognized either of these exceptions to the general prohibition against surreptitious recording by lawyers.) This exception for "surreptitious recording" was meant to accomplish the same goal as the exception established in *Parker*. These exceptions serve to facilitate attorney involvement in criminal investigations to best protect the rights of the suspect and safety of our citizens.

Similarly, in Ethics Opinion 96 (rev'd 2012), the Committee determined that Colo. RPC 4.2 did not prohibit prosecutors from having some forms of *ex parte* contact with represented persons during criminal investigations. CBA Ethics Comm., Rev. Formal Op. 96 (2012) at p. 4 ("a prosecuting attorney or government lawyer may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation if the communication is made in the course of an investigation into possible unlawful conduct."). In reaching its decision, the committee explained why prosecutors should be exempt from a strict application of Rule 4.2:

> [i]n recent years, prosecutors and other lawyers charged with enforcing criminal and civil regulatory laws have begun to play a larger role in pre-arrest and pre-indictment investigations. This trend has been viewed positively by the general public and the bar because of the perception that a lawyers involvement in a criminal and civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards.

Id. at p. 1. The ethics community recognizes that prosecutors "may perform duties that are distinctly different from those performed in the private practice of law." *Id.* at 7. A strict or literal application of some ethical rules is inappropriate, and counter-productive, to attorneys who must by law advise and supervise on-going criminal investigations.

Courts have uniformly approved the practice of prosecutors supervising or directing lawful covert or pre-textual activities. *See, e.g., United States v. Parker*, 165 F. Supp. 2d 431, 476-77 (W.D.N.Y. 2001) ("Defendants' logic would, if accepted, mean that government attorneys could not supervise investigations involving undercover agents and informants who cannot reveal their true identity and purpose to the targets of the investigation without thereby rendering the investigation futile and dangerous. There is no authority for such a conclusion."); *see also* Douglas R. Richmond, *Deceptive Lawyering*, 74 U. Cin. L. Rev. 577 (Winter 2005) ("Similarly, government lawyers may supervise lawful covert activities involving deception and misrepresentation by law enforcement personnel to gather information without violating Rule 8.4(c) or DR 1-102(A)(4).")

The American Bar Association *recommends* that prosecutors supervise covert criminal investigations. ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.2 and 1.3. Prosecutors are encouraged to "be familiar with routine investigative techniques and the best practices to be employed in using them," *Id.* Standard 2.3(a), and help decide what techniques are best suited for the investigation. *See id.* Standard 2.3(d) ("The prosecutor should consider the views of experienced police and other law enforcement agents about safety and technical and strategic considerations in the use of investigative techniques."). The Department of Justice *requires* that federal prosecutors review and approve certain undercover activity by law enforcement agents. *See* United States Attorney's Manual §§ 9-7.302(V). Additionally, every state ethics opinion or rule that has considered whether prosecutors may supervise lawful covert or pre-textual investigations has approved the practice.

Lawyers acting as advisors to law enforcement officers, whether they be employees of the lawyer or an outside agency working with the attorney, should be able to advise and supervise undercover investigations involving deceptive practices without fear of professional discipline. Colorado continues to be in the middle of the controversy surrounding the application of Colo. RPC 8.4(c) to undercover government investigations. Many other states have faced this very question and have opted to either modify the rule or provide an interpretation or comment to the rule which clarifies the disciplinary rule. Colorado should follow the lead of Utah, Iowa, Florida, Alaska, Ohio, Oregon, Tennessee, Wisconsin, New York, and Alabama and recognize the importance of having attorneys supervise law enforcement investigations, including undercover investigation.

Furthermore, amending the rule to explicitly permit attorneys to advise investigators during undercover investigations would not conflict with the Colorado Supreme Court's Opinion *In re Pautler* and, in fact, is supported by it. The Colorado Supreme Court specifically recognized that this exception existed in other jurisdictions, but held that it was inapposite to the circumstances of that case. *Pautler*, 47 P.3d 1175 (Colo. 2002).

Undercover or deceptive investigative techniques are fundamental to our system of criminal justice, and help prosecute the most serious crimes. *See United States v. Russell*, 411 U.S. 423, 432 (1973). In addition to sexual exploitation of children, the most serious offenses in our community are investigated using deceptive strategies, including terrorism, human trafficking, child pornography, organized economic crime, auto theft, and drug trafficking. The benefits to the community of these investigations are obvious. If advising, directing or supervising such investigations is deemed unethical, the investigations will continue – but without legal advice or attorney supervision. The rights of ordinary citizens, criminal suspects, and crime victims will be jeopardized, as will the public's confidence in the legal system.

The circumstances presented in CHEEZO investigations, the conduct by the investigators and role the District Attorney played, expressly fits within the proposed rule change and should be adopted by this court. To say that investigators can not use lawful deceptive techniques while working for a District Attorney's Office has only two results: forcing these investigations out of the District Attorney's Office or making investigators employed in a District Attorney's Office unable to carry out investigations to the best of their ability. This interpretation of the Rules creates an unwarranted barrier to effective and

ethical criminal investigation and prosecution. Furthermore, continuing to allow for such an interpretation jeopardizes the important role prosecutors should play in advising undercover operations conducted throughout the state. By including the very specific language proposed in this rule change, such an interpretation would be foreclosed.

For the foregoing reasons, I urge the Court to approve the proposed rule change.

Respectfully,

PETER A. WEIR
District Attorney

Exhibit 1

OARC December 16, 2016 Letter Closing Investigation

Attorney Regulation Counsel
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Jonathan P. White

December 16, 2016

Keith Goman, Esq.
1001 17th St., Suite 300
Denver, CO 80202

Re: Requests for investigation regarding Peter Weir and Scott Storey filed by Philip Alan Cherner, Case Nos. 15-2905 and 15-2906

Dear Mr. Goman:

The Office of Attorney Regulation Counsel has reviewed the evidence in this matter in light of the Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings and the Colorado Rules of Professional Conduct.

As we discussed, Mr. Cherner's Request for Investigation regarding the First Judicial District's "CHEEZO" unit raised concerns regarding whether the unit's operation constituted an ongoing violation of Colo. RPC 8.4(c). We understand that Mr. Weir has decided to dissolve the investigative arm of the CHEEZO unit, which leaves only the public education arm of the unit in existence. In light of that decision, our office has decided to dismiss these matters.

These matters have been dismissed.

Sincerely,

James C. Coyle
Attorney Regulation Counsel

JCC/JMV/rli

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September 7, 2017

Via U.S. Mail and Email (cheryl.stevens@judicial.state.co.us)

Cheryl Stevens
Chief Deputy Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Amendment to Colo. RPC 8.4(c)

Dear Ms. Stevens:

I write as Chair of the Court's Standing Committee on the Rules of Professional Conduct in response to the Court's request for comments on a proposed amendment to Rule 8.4(c) of the Colorado Rules of Professional Conduct. As the Standing Committee understands the proposed amendment, it would permit attorneys, notwithstanding the general prohibition in Rule 8.4(c) against attorney "conduct involving dishonesty, fraud, deceit or misrepresentation," to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities" that involve pretextual conduct.

The Standing Committee did not propose the Rule 8.4(c) amendment and the Court's schedule for comments and hearing did not afford the Committee sufficient time to evaluate and determine the Committee's position on the proposal. Therefore, the Standing Committee does not take a position on the amendment, although individual Committee members may have submitted individual comments.

In the interest of helping the Court evaluate the proposed amendment, I enclose a table entitled "'Pretexting' Rules and Comments in Other Jurisdictions That Deviate From ABA Model Rules of Professional Conduct, Plus Ethics Opinions That Interpret Those Rules or Rules Identical to ABA Model Rules," prepared at the Standing Committee's request by member Alec Rothrock. Mr. Rothrock also authored the table provided as Attachment 2 to the December 19, 2011 "Final Report" of the Pretexting Subcommittee of the Standing Committee, which the Court has previously received. The original version of the table was current through March 10, 2011; the enclosed, updated version is current through June 20, 2017.

Because the Standing Committee will not take a position on the proposed amendment, I am not requesting leave to participate in the hearing scheduled for

September 14, 2017. However, I plan to attend that hearing and if the Court desires, I would be happy to provide background information to the Court concerning the Standing Committee's consideration of potential "pretexting" rule changes in 2011 and 2012. I will also be available to answer questions that the Court might have.

Respectfully,

Marcy G. Glenn, Chair
Colorado Supreme Court Standing Committee
on the Rules of Professional Conduct

MGG:ko
Encls.
cc: Standing Committee on the Rules of Professional Conduct (via email)

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"PRETEXTING" RULES AND COMMENTS IN OTHER JURISDICTIONS THAT DEVIATE FROM ABA MODEL RULES OF PROFESSIONAL CONDUCT, PLUS ETHICS OPINIONS THAT INTERPRET THOSE RULES OR RULES IDENTICAL TO ABA MODEL RULES

Alec Rothrock
June 20, 2017

State	Rule	Comment	Ethics Op.
Alabama	**3.4** (1994) A lawyer shall not: . . . **(d)** request a person other than a client to refrain from voluntarily giving relevant information to another party, unless: . . . (3) the information pertains to **covert** law enforcement investigations in process, such as the use of undercover law enforcement agents. **Amendment to Ala. Rule of Professional Conduct Rule 3.8(2) (2009):** . . . **(2)** The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except: (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through orders, directions, advice and encouragement, may cause other agencies and offices of government, and may cause non-lawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and	**3.4** (1994) Paragraph (d) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2. **Amendment to Comment to Ala. RPC 3.8(2) (2009):** Paragraph (2) deals with situations in which the ethical obligation of the prosecutor as lawyer might prevent the government from taking action that would not otherwise be prohibited by any law. For example, in undercover and sting operations, the making of false statements is the essence of the activity. The prosecutor is prohibited by Rule 4.1(a) from making false statements and is prohibited by Rule 8.4(a) from knowingly assisting or inducing another to violate the Rules. In order to make clear that the prosecutor may cause the government to act in the fight against crime to the fullest extent permitted to the government by existing law, paragraph (2)(a) makes clear that the prosecutor may order, direct, encourage and advise with respect to any lawful governmental action. However, where lawyers generally are prohibited by the Rules from taking an action, the prosecutor is likewise prohibited from personally violating the Rules. In such situations, the prosecutor's actions, as	**Op. RO-2007-05 (Sept. 12, 2007):** During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public. Following rationale of *Apple Corps Limited, MPL v. International Collectors Society*, 15 F. Supp. 2d 456 (D.N.J. 1998) (Alabama Rule 4.2 applicable only to contact with represented parties). **Ala. State Bar Office of General Counsel Ethics Op., R0-2007-05 (2007):** During pre-investigation of possible infringement of intellectual property rights, may a lawyer employ private investigators to pose as potential customers under the pretext of seeking services of the suspected infringers in the same manner as a member of the general public? *Id.* at 1. Disciplinary Commission agrees with and adopts the rationale expressed by the court in *Apple Corps Limited, MPL v.*

	(b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.	distinct from those of other governmental entities, are limited so as to preserve the integrity of the profession of law. Paragraph (2) is applicable only to lawyers acting as prosecutors. It is designed to accommodate the prosecutor's special responsibility in governmental law-enforcement activities and is not applicable otherwise.	*International Collectors Society,* 15 F. Supp. 2d 456, 476 (D.C. N.J. 1998) wherein the court held that lawyers and private investigators conducting a pre-litigation investigation may misrepresent their identity and purpose to detect ongoing violations of the law where it would be difficult to discover those violations by any other means. Such misrepresentations, limited in scope to identity and purpose, do not constitute "dishonesty, fraud, deceit or misrepresentation" proscribed by Rule 8.4(c), Ala. R. Prof. C. *Id.* at 4-5.
Alaska		**Repromulgated Alaska R. Prof. Conduct 8.4, cmt. [4] (Supreme Court Order No. 1680, Apr. 15, 2009):** **8.4** (2009) . . . [4] This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer's conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. "Covert activity," as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.	

Arizona			**Arizona Ethics Opinion 99-11 (Sept. 1999):** Whether an attorney ethically may hire a private investigator to pose as someone interested in being admitted to a post secondary school using the client's actual work as a sample for admission, in order to gather facts for a civil suit. The rules themselves should be harmonized in order to prevent unnecessary conflict and should not be used as a shield to hide discrimination. In such cases, the lawyer's essential purpose is to evaluate the facts against the legal standards. It is many times essential for a lawyer to use "testers" in order to meet the attorney's responsibilities under the ethical rules. While recognizing the tension between the purposes of the conduct and rules, Isbell and Salvi [David B. Isbell & Lucantonio N. 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 Georgetown Journal of Legal Ethics 791 (1995)] come to the conclusion that when a lawyer directs a tester or investigator to make misrepresentations solely about their identity or purpose in contacting the person or entity who is the subject of investigation, and when the misrepresentations are made only for the purposes of gathering facts before filing a lawsuit by a lawyer who supervises or directs the tester's activities, the lawyer's

			conduct does not violate any provision of the model rules. *Id.* at 829. It is an opinion with which the Committee must agree. The ethical rules are not meant to prohibit the legitimate conduct which is contemplated by the hypothetical presented.
D.C.		**D.C. Bar Appx. A, Rule 4.2, cmt. [12] (2007 Revisions):** [12] This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.	**D.C. Op. 323 (March 29, 2004):** Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties. ("The prohibition against engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" applies, in our view, only to conduct that calls into question a lawyer's suitability to practice law.") [I]n rejecting the formulation of "moral turpitude" and substituting the current anti-deceit formulation, the District of Columbia Court of Appeals has indicated its intention to limit the scope of Rule 8.4 to conduct which indicates that an attorney lacks the character required for bar membership. As the Comments elaborate, this may include "violence, dishonesty, breach of trust, or serious interference with the administration of justice." D.C. Rule 8.4, Comment [1].3 But, clearly, it does not encompass all acts of deceit-for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.

Florida	**Amendment to Fla. Bar Reg. R. 4-8.4 (*See In re Amendments to the Rules Regulating the Fla. Bar*, 24 So. 3d 63, 144 (Fla. 2009)):** **8.4** A lawyer shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except 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, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.	**Amendment to Comment to Fla. Bar Reg. R. 4-8.4(c) (*See In re Amendments to the Rules Regulating the Fla. Bar*, 24 So. 3d 63, 145 (Fla. 2009)):** **8.4** Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.	
Iowa		**Amendment to Iowa R. of Prof'l Conduct 32:8.4(c), cmt. [6] (Court Order Apr. 20, 2005, effective July 1, 2005):** **8.4** (July 1, 2005) . . . [6] It is not professional misconduct for a lawyer to advise clients or others about or to supervise or participate in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights or in lawful intelligence-gathering activity, provided the lawyer's conduct is otherwise in compliance with these rules. "Covert activity" means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when 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. Likewise, a government lawyer who supervises or participates in a lawful covert operation which involves misrepresentation or deceit for the purpose of gathering relevant information, such as law enforcement investigation of suspected illegal activity or an intelligence-gathering activity, does not, without more, violate this rule.	
Michigan	**8.4** (2005) It is professional misconduct for a lawyer to: . . . **(b)** engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;		
Missouri	**Amendment to Mo. Sup. Ct. R. 4-8.4(c) (Apr. 27, 2012, effective July 1, 2012):** It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. It shall not be professional misconduct for a lawyer for a criminal law enforcement agency, regulatory agency, or state attorney general to advise others about or to supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency, regulatory agency, or state attorney general to participate in an undercover investigation, if the entity is authorized by law to conduct undercover investigations.	**Amendment to Mo. Sup. Ct. R. 4-8.4(c), cmt. [3] (Apr. 27, 2012, effective July 1, 2012):** [3] Rule 4-8.4(c) recognizes instances where lawyers for criminal law enforcement agencies, regulatory agencies, or the state attorney general advise others about or supervise others in undercover investigations and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these entities. This exception is not intended to state or imply that an entity has the authority to conduct undercover investigations unless that authority is separately granted to the entity by law. Although the exception appears in this rule, it is also applicable to Rules 4-4.1 and 4-4.3. This exception does not authorize conduct otherwise prohibited by Rule 4-4.2. Nothing in the rule	

		allows the lawyer to advise others about or supervise others in undercover investigations unless the criminal law enforcement agency, regulatory agency, or state attorney general is authorized by law to engage in such conduct.	
New York			**NYCLA Professional Ethics Committee Formal Op. 737 (May 23, 2007):** Under what circumstances, if any, is it ethically permissible for a nongovernment lawyer to utilize the services of and supervise an investigator if the lawyer knows that dissemblance will be employed by the investigator? *Id.* at 1. 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. *Id.* 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. *Id.* at 2. 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. *Id.* at 3.
North Carolina		**Amendment to N.C. R. Prof. Conduct 4.2, cmt. [4] (Mar. 1, 2003):** [4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.	**97 N.C. Formal Ethics Op. 10 (Jan. 16, 1998):** May a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell? Yes, provided the prosecutor also instructs the officers to conduct their listening activities within all applicable constitutional and statutory limitations and, where necessary, to explain those limitations to the officers. This opinion is limited to the conduct of prosecutors.

		Amendment to N.C. R. Prof. Conduct 8.4, cmt. [I] (Mar. 1, 2003): [1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client or, in the case of a government lawyer, investigatory personnel, of action the client, or such investigatory personnel, is lawfully entitled to take.	**2014 N.C. Formal Ethics Op. 9 (July 17, 2015):** Prior to filing a lawsuit, may Attorney A retain a private investigator who will misrepresent his identity and purpose when conducting an investigation into E's wage payment practices? In the pursuit of a legitimate public interest such as in investigations of discrimination 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. A lawyer may not advise, direct, or supervise the use of misrepresentation to pursue the purely personal interests of the lawyer's client, where there is no public policy purpose, such as the interests of the principal in a family law matter. This opinion does not apply to the conduct of a government lawyer. As explained in comment [1] to Rule 8.4, the prohibition in

			Rule 8.4(a) against knowingly assisting another to violate the Rules of Professional Conduct or violating the Rules of Professional Conduct through the acts of another does not prohibit a government lawyer from providing legal advice to investigatory personnel relative to any action such investigatory personnel are lawfully entitled to take.
North Dakota	**8.4** (Aug. 1, 2006) It is professional misconduct for a lawyer to: . . . **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;		
Ohio		**8.4** (Feb. 1, 2007) [2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.	
Oregon	**Amendment to Ore. RPC 8.4(a)(3) (2005):** (a) It is professional misconduct for a lawyer to: . . . (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law; **Amendment to Ore. RPC 8.4(b) (2005):** . . . (b) 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		**Oregon Op. 2005-173 (Aug. 2005) (interpreting Rule 8.4(a)(3) and (b)):** A lawyer's involvement in covert activity is not protected by Oregon RPC 8.4(b) when, as here, there are no "violations of civil law, criminal law, or constitutional rights" to investigate. *Id.* at 5. Oregon RPC 8.4(b) is meant to permit a lawyer only to provide advice and supervision regarding covert activity, not to participate directly in that activity. *Id.* at 6.

	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. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when 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.		Oregon RPC 8.4(b) requires both an honest subjective belief in the possibility that unlawful activity "has taken place, is taking place or will take place in the foreseeable future," and some rational basis for that belief. The rule does not encompass a good-faith belief merely in a "possibility" of unlawful activity, but a good-faith belief in a "reasonable possibility" of such activity. *Id.* at 8.
South Carolina		**Amendment to Rule 4.l(a), RPC, Rule 407, SCACR, cmt. [2] (2005):** [2] A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or others, of false identifications, backgrounds and other information for purposes of the investigation or operation.	
Tennessee		**Amendment to Tenn. RPC 8.4(c), cmt. [5] (2003):** [5] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.	

Utah			**Utah State Bar Ethics Advisory Opinion No. 02-05 (March 18, 2002):** A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct. **Utah Ethics Advisory Opinion 02-05 (Jan. 4, 2002):** What are the ethical considerations for a governmental lawyer who participates in a lawful covert governmental operation, such as a law enforcement investigation of suspected illegal activity or an intelligence gathering activity, when the covert operation entails conduct employing dishonesty, fraud, misrepresentation or deceit? *Id.* at paragraph 1. In our view, Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations. We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or "covert" operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law

			in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. We do hold, however, that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation. *Id.* at paragraph 10.
Virginia	**8.4** (March 25, 2003) It is professional misconduct for a lawyer to: . . . **(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law		**Virginia Op. 1845 (June 16, 2009) (interpreting Rule 8.4(c) in UPL investigations by bar)** **Va. Legal Ethics Opinion 1738 (Apr. 13, 2000):** [A]re there circumstances under which an attorney, or an agent under the attorney's direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge? *Id.* at 1. If the lawyer directly supervises police or other non-lawyer investigators who employ tactics that are regarded as unethical, then such behavior is imputed to the lawyer who faces discipline. Rules 5.3(c)(l) and 8.4(a). To avoid these consequences, the lawyer may choose to exercise no control or supervision over the investigator. This can result in police being deprived of critical legal guidance or, in a civil case, an unsupervised investigation in which

			important matters may have been overlooked that might have been discovered had the investigator been supervised. *Id.* at 10. [T]he committee is of the opinion that Rule 8.4 does not prohibit a lawyer engaged in a criminal investigation or a housing discrimination investigation from making otherwise lawful misrepresentations necessary to conduct such investigations. The committee is further of the opinion that it is not improper for a lawyer engaged in such an investigation to participate in, or to advise another person to participate in, a communication with a third party which is electronically recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, as long as the recording is otherwise lawful. *Id.* at 12-13. **Va. Legal Ethics Opinion 1765 (June 13, 2003) (interpreting Rule 8.4(c) in context of attorney working undercover for federal intelligence agency):** [I]ntelligence and covert activities of attorneys working for the federal government are an appropriate exception under the new language of Rule 8.4(c), with its additional language limiting prohibition only to such conduct that "reflects adversely on the lawyer's fitness to practice law." Accordingly, the committee opines that when an attorney employed by the federal government uses lawful methods, such as the use of "alias identities" and non-consensual tape recording, as part of his intelligence or covert activities, those

			methods cannot be seen as reflecting adversely on his fitness to practice law; therefore, such conduct will not violate the prohibition in Rule 8.4(c). *Id.* at 3.
Wisconsin	**4.1** (July 1, 2007) (a) In the course of representing a client a lawyer shall not knowingly: (1) make a false statement of a material fact or law to a 3rd person; or (2) fail to disclose a material fact to a 3rd person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [Rule 1.6]. (b) Notwithstanding par. (a), [Rule 5.3 (c)(1)], and [Rule 8.4], a lawyer may advise or supervise others with respect to lawful investigative activities.	**4.1** (July 1, 2007) Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See Rule 1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See [Rule 8.4(c)]. Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor only when 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.	**WISCONSIN COMMITTEE COMMENT** Paragraph (b) has no counterpart in the Model Rule. As a general matter, a lawyer may advise a client concerning whether proposed conduct is lawful. See SCR 20:1.2(d). This is allowed even in circumstances in which the conduct involves some form of deception, for example the use of testers to investigate unlawful discrimination or the use of undercover detectives to investigate theft in the workplace. When the lawyer personally participates in the deception, however, serious questions arise. See SCR 8.4(c). Paragraph (b) recognizes that, where the law expressly permits it, lawyers may have limited involvement in certain investigative activities involving deception. Lawful investigative activity may involve a lawyer as an advisor or supervisor only when 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.
Wyoming		**Amendment to WY Prof. Conduct Rule 3.8 (b), cmt. [2] (2014):** [2] Rule 3.8(b) is not intended to prohibit prosecutors from participating directly or indirectly in constitutionally permissible investigative actions. Therefore, for purposes of the Rule, "the accused"	

		means a person who has been arrested and brought before a magistrate, or a person against whom adversarial judicial criminal proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. In addition, a prosecutor may ethically advise law enforcement officers regarding the full range of constitutionally permissible investigative actions, including lawful contacts with a suspect, target, or defendant.	

COLORADO
Department of Revenue
Executive Director's Office
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Denver, CO 80203

Mailing Address:
P.O. Box 17087
Denver, CO 80217-0087

August 31, 2017

Colorado Supreme Court
c/o Cheryl Stevens,
Chief Deputy Clerk of the Colorado Supreme Court
2 East 14th Avenue,
Denver, CO 80203

RE: Proposed Amendment to Colo. R.P.C. Rule 8.4(c)

Dear Ms. Stevens:

I understand the Colorado Supreme Court will conduct a hearing on a proposed rule change to the Colorado Rules of Professional Conduct, Rule 8.4(c) on September 14, 2017. The Court has requested written public comments by any interested person regarding the rule change.

Please consider my following comments as offered in my official capacity as the Executive Director on behalf of the Colorado Department of Revenue (the "Department"). The Department strongly supports the proposal.

Undercover investigations are a vital law enforcement tool and Department investigators need access to the advice and counsel of government lawyers to ensure that their actions comply with the letter and spirit of the law and produce reliable admissible evidence to support their criminal prosecutions and civil enforcement actions. The proposed amendment to the rule would ensure that the Attorney Rules of Professional Conduct are not misapplied in a manner that endangers either the Department's investigators, by ensuring that they comply with the law, and protects an investigated party by ensuring their legal rights are not violated.

In my current role, I supervise the varied functions of the Department. I am responsible for the Department's Taxation Division, the Division of Motor Vehicles, Lottery, and Enforcement for Gaming, Liquor and Tobacco, Racing, and Marijuana. The Department has more than 1,500 employees and annually brings in more than $11 billion in fees and taxes for the state.

The Marijuana Enforcement Division, Liquor Enforcement Division, Division of Motor Vehicles, Division of Lottery, Division of Taxation and Division of Gaming are among the Department programs that have, or may have need to conduct undercover investigations. Examples of matters subject to undercover investigations may range from criminal tax matters,

to the proper tracking and sale of marijuana plants and products, to the prohibition of access by underage users to marijuana and liquor. The utility of these investigations ranging from helping ensure that licensees do not allow underage individuals to engage in restricted activities, to helping assist that the regulation of highly restricted activities remain part of "closed-looped" systems and are not otherwise diverted.

As the Executive Director, I supervise, directly and indirectly, investigators who at times are required to undertake undercover investigations to protect the public health, safety and welfare of the public by ensuring the viability of the Department programs. At times, investigators in these undercover investigations may need guidance and direction from attorneys regarding legal issues arising within the context of covert investigations. Additionally, allowing the current rule to remain unchanged significantly and negatively impacts the Department's ability to hire attorneys for top leadership positions, like the Senior Director of Enforcement position which oversees the Marijuana, Liquor and Tobacco, Gaming, Racing and Motor Vehicle Dealer programs. These leadership positions require oversight and supervision of investigations required to ensure regulatory compliance, which necessarily includes supervising undercover investigators.

Such undercover investigations are critical to support criminal convictions and civil judgments and further the work of the regulators in the Department of Revenue. It remains imperative for government agents to consult attorneys while conducting covert investigations. Not only does it maximize the Department's ability to obtain relevant admissible evidence in meritorious cases, but it also ensures the maximum protection of the rights inuring to the subjects of the investigations.

Despite the legality of covert investigative tactics, they include substantial risk. This risk is not just for the physical safety of law enforcement officers but also stems from the legal and constitutional requirements investigators must navigate to ensure that crucial evidence is collected and is admissible in any resulting prosecution or civil/regulatory enforcement action.

I understand the American Bar Association *Standards for Criminal Justice: Prosecutorial Investigations* identifies a number of issues a prosecutor must consider when advising an undercover operation, including unnecessary intrusions or invasions into personal privacy; entrapment of otherwise innocent persons; interference with privileged or confidential communications; interference with or intrusion upon constitutionally protected rights; and agent involvement in illegal conduct that would be considered offensive to public values and may adversely impact a jury's view of a case. ABA Standard 26-2.3(d).

Due to the needs of law enforcement officers for expert legal advice regarding these complex issues, the American Bar Association recommends lawyer supervision of covert investigations (and, of course, recognizes the ethical propriety of such lawyer supervision). *See* ABA Standards 1.2 & 1.3. The ABA directs prosecutors to "provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use."

ABA Standard 1.3(g). "Police errors during an investigation ... can impair or entirely undermine a case." Commentary to ABA Standard 1.3(b).

Moreover, lawyer supervision protects the constitutional and other rights of the target of an investigation. ABA Standards 1.2, 2.2, & 2.3. Given the pivotal role lawyers play in undercover operations, "[a] prosecutor would not be doing his job effectively if he or she refused to give an officer accurate legal advice to help the officer prepare to conduct a lawful covert operation or interrogation, especially when the entire case migh[t] rest on the admissibility of the evidence." H. Morley Swingle & Lane P. Thomasson, *Feature: Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (2013); *accord* ABA Standard 1.3, Commentary to Subdivision 1.3(g) (explaining that complying with ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve 'deceit'").

The Ethics Committee of the Colorado Bar Association, recognizing that prosecutors and lawyers "charged with enforcing criminal and civil regulatory laws have begun to play a larger role in pre-arrest and pre-indictment investigation," has expressed a similar public policy sentiment. CBA Comm. on Ethics, Formal Op. 96 (1994) (rev. 2012). It further acknowledged that this "trend has been viewed positively by the general public and the bar because of the perception that a lawyer's involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards." *Id.*; see also CBA Comm. on Ethics, Formal Op. 112 (2003).... (explaining that although "surreptitious recording ... may involve an element of trickery or deceit," government attorneys should be allowed to use surreptitious recordings "for the purpose of gathering admissible evidence" because "attorney involvement in the process will best protect the rights of criminal defendants").

I understand that the current language of the Rule 8.4(c) and certain language in the decision of the Colorado Supreme Court in the *In Re Pautler* (47 P.3d 1175 (Colo. 2002)) case is read by some interests to "restrict" an attorney's ability to provide guidance to undercover investigators. I also understand that several of the Attorney Rules of Professional Conduct, including 8.4(a) and 5.3 prohibit attorneys from directing others to do something that as a lawyer, they cannot themselves do under the Rules of Professional Conduct. This approach creates uncertainty among the investigators charged with conducting covert investigations, because they would no longer have access to counsel and guidance to understand the legal limits of what conduct by law enforcement is permissible in the context of an undercover investigation.

At least 19 jurisdictions have specifically approved attorney supervision of undercover investigations, either directly or by adding an express "fitness to practice law" qualification to Rule 8.4(c). This approval has taken the form of rule amendments, comment amendments, and ethics opinions. For example, in 2009 Alabama amended its version of Rule 3.8 (special duties of a prosecutor) to recognize that prosecutors, "[n]otwithstanding Rules 5.3 and 8.4" may advise or encourage investigators "to engage in any action that is not prohibited by law." Ala. Rules of

Prof. Conduct Rule 3.8(2) (2009 amendment). Florida provides a different example; Florida amended its version of Rule 8.4(c) to recognize 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, unless prohibited by law or rule." Fla. Bar Reg. R. 4-8.4 (2009 amendment).

The current draft rule as published provides a clarity that benefits the investigators who must be constantly cognizant of the law and the rights of the subjects of investigations. It also protects those subject to investigations to ensure their rights are respected and they are afforded due process under the law. There is a direct need for this clarification of the ethical rules applicable to government attorneys who represent these undercover investigators to ensure that the investigators receive the needed guidance and directions regarding the legality of their conduct in undercover investigations. The proposed rule addresses that need and I urge the Court to adopt the change set out in the draft rule.

Sincerely,

Michael S. Hartman
Executive Director
Department of Revenue
State of Colorado

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September 8, 2017

Via E-Mail: cheryl.stevens@judicial.state.co.us and Hand Delivery

Colorado Supreme Court
c/o Cheryl Stevens
Chief Deputy Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Support of Proposed Amendment to R.P.C. 8.4(c) on Behalf of the Intellectual Property Section of the Colorado Bar Association

Dear Chief Justice Rice and Fellow Justices:

Lathrop Gage LLP joins the firms listed in the attached submission from the IP Section of the Colorado Bar Association supporting the proposed amendment to Rule 8.4(c). The undersigned apologizes for the tardy submission of this support and hopes Lathrop Gage's support will be given due consideration.

Very truly yours,

Lathrop Gage LLP

By: Jon R. Trembath
Jon R. Trembath

JRT/lh

Enclosures

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September 5, 2017

Via Electronic Mail and Hand Delivery

Colorado Supreme Court
c/o Cheryl Stevens
cheryl.stevens@judicial.state.co.us
Chief Deputy Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Support of Proposed Amendment to R.P.C. 8.4(c) on Behalf of the Intellectual Property Section of the Colorado Bar Association

Dear Chief Justice Rice and Fellow Justices:

On behalf of the Intellectual Property Section ("IP Section") of the Colorado Bar Association,[1] I write to provide ***support for the proposed amendment to Rule 8.4(c)*** of the Colorado Rules of Professional Conduct.

I also attach as Exhibit A a list of law firms and IP attorneys who have authorized me to identify them as supporting the proposed amendment to Rule 8.4(c).

In its current form, CRCP Rule 8.4(c) prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." CRCP Rule 5.3(c) further states that "[w]ith respect to nonlawyers employed or retained by or associated with a lawyer … a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if … the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." As currently drafted, these and other Rules of Professional Conduct may be interpreted to prohibit otherwise lawful activities that are important not only to investigate whether IP rights (including patents, trademarks, and copyrights) are being infringed, but also to conduct IP-related investigations, such as legally required pre-suit investigations, as required by state and federal rules.

To satisfy prefiling obligations and initiate effective actions to enforce intellectual property rights, IP attorneys often need to obtain samples of allegedly infringing products in order to examine and analyze them, ascertain the source of allegedly infringing products and/or methods, and determine the manner in which allegedly infringing products and/or methods are made or used. For example, in the case of counterfeit goods, before or after commencing an action against an Internet infringer or counterfeiter, a brand owner may hire private investigators to contact the online seller, exchange communication with the seller and purchase infringing or

[1] This letter reflects the position of the IP Section of the Colorado Bar Association, not the views of the Colorado Bar Association in its entirety.

counterfeit goods to ultimately identify the seller and ascertain his or her domicile to understand the scope of use of the protected trademark. These investigations are important because for many types of IP rights violations, the only manner by which a property owner can adequately protect its investment in its intellectual property and avoid diluting such rights is to bring a swift enforcement action. In addition, IP attorneys may need to use investigators in non-adversarial situations. For example, trademark attorneys often use investigators to contact companies to confirm that marks are no longer in use—perhaps by calling a customer service line.

As it currently stands without amendment, Rule 8.4(c) may have the unintended effect of materially hampering the protection of intellectual property rights and decreasing the economic value of intellectual property.

For these and similar reasons, the IP Section and its membership have been focused on education about and guidance concerning Rule 8.4(c) for a significant period of time. In April 2010, the IP Section held a CLE panel event entitled "Using Deception in IP Related-Investigations: Are You Unwittingly Violating The Colorado Rules of Professional Conduct." Later that year, in October 2010, the IP Section Leadership formally requested guidance concerning Rule 8.4(c) from Colorado Supreme Court Standing Committee on Rules of Professional Conduct. The IP Section's request led to the extensive work and reports of the Standing Committee and the Subtexting Subcommittee. In December 2012, the IP Section sought to educate its members and other attorneys through a CLE panel event on the result of the Subtexting Subcommittee's work, featuring several of Subcommittee members, entitled, "Pretexting, *Pautler*, and the Colorado Rules of Professional Conduct." Finally, the issue and the IP Section's efforts were documented in a June 2014 article in the Colorado Lawyer, entitled "Pretext Investigations: An Ethical Dilemma for IP Attorneys," by Rachel L. Carnaggio (attached as Exhibit B).

Consistent with the IP Section's prior positions—as well as the 2012 majority recommendation in the Supplemental Report of the Pretexting Subcommittee of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct—the IP Section supports the proposed clarifying amendment, which adds a limited exception to Rule 8.4(c), such that it reads:

> It is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities[.]

The IP Section supports this proposed clarifying amendment for several reasons, including the following. First, the proposed exception provides understandable guidelines for intellectual property attorneys to follow when engaging in presuit investigations. Second, the proposed exception continues to prevent otherwise unlawful activities. Third, the exception allows intellectual property attorneys to use agents, such as professional investigators, to obtain

background, identification, purpose, or similar information. Fourth, it permits attorneys' involvement in presuit investigation, such that attorneys can assist in ensuring that those investigations are lawful.

We appreciate your attention to this important matter and to these comments.

Best regards,

Mary (Mindy) V. Sooter

Chair, IP Section of the Colorado Bar Association

EXHIBIT A

Law Firms

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Individuals

Name	Corporation / Firm*
Andrea Anderson	Holland & Hart
Gene Bernard	Greenburg Traurig
Regina Drexler	Ireland Stapleton
Paul Dunlap	Corporate Patent Counsel, Gates Corporation
Ben Fernandez	WilmerHale
Thomas Franklin	Kilpatrick Townsend & Stockton
Charles Gray	Kilpatrick Townsend & Stockton
Natalie Hanlon Leh	Former Chair of the IP Section of the Colorado Bar Association WilmerHale Denver
Matthew Holohan	Secretary, Treasurer of the IP Section of the Colorado Bar Association Kilpatrick Townsend & Stockton
Judith Keene	Holzer Patel
John Kennedy	Wash Park IP
Beth Magnussen	Vice Chair of the IP Section of the Colorado Bar Association

Scott McMillan	Kilpatrick Townsend & Stockton
Jyoti Pandya	Pandya Law
James Poole	Kilpatrick Townsend & Stockton
John Posthumous	Former Chair of the IP Section of the Colorado Bar Association Sheridan Ross
Kristopher Reed	Kilpatrick Townsend & Stockton
Evan Rothstein	Brownstein Hyatt Farber Schreck
Tim Reynolds	Bryan Cave
Karam Saab	Kilpatrick Townsend & Stockton
Jim Sawtelle	Sherman & Howard
Mary (Mindy) Sooter	Chair of the IP Section of the Colorado Bar Association Wilmer Cutler Pickering Hale & Dorr
David Stephenson	Dittavong & Steiner
Jon Tandler	Sherman & Howard
John Wahl	Greenburg Traurig

* The support of the listed individual reflects their own views, and does not reflect the views of the firm or organization with which the individual is associated.

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Articles
Intellectual Property Law

Pretext Investigations: An Ethical Dilemma for IP Attorneys

by Rachel L. Carnaggio

Intellectual Property Law articles are sponsored by the CBA Intellectual Property Section. They provide information of interest to intellectual property attorneys who advise clients on protecting and exploiting various forms of intellectual property in the marketplace.

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About the Author

Rachel L. Carnaggio is a registered patent attorney engaged in patent and trademark prosecution and portfolio management with the intellectual property law firm HolzerIPLaw, PC—(720) 204-3234, rcarnaggio@holzeriplaw.com.

This article addresses the existing ethical dilemma for a Colorado attorney involved in misrepresentation or nondisclosure when gathering pre-filing evidence in compliance with Rule 11. Such conduct may violate the Colorado Rules of Professional Conduct and calls for definitive guidance.

The Colorado Rules of Professional Conduct (Rules) place limitations on pretexting (covert investigations) for intellectual property (IP) attorneys, as well as for attorneys in other practice areas. A pretexting subcommittee of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct proposed rule changes to the Standing Committee in an effort to provide guidance in pretexting. The Standing Committee voted against recommending any amendments; however, it voted in favor of submitting the subcommittee's research and reports to the Court, where they have waited for more than a year for review. This article summarizes the existing quandary for IP attorneys, how Colorado and other jurisdictions have addressed pretexting, and the pretexting subcommittee's efforts.

The Ethical Dilemma

Pretext investigations generally involve nondisclosure or misrepresentation to a suspected wrongdoer to obtain evidence that cannot be obtained by other means. To comply with Rule 11 and the heightened pleading standard set forth in *Ashcroft v. Iqbal*[1] and *Bell Atlantic Corp. v. Twombly*,[2] misrepresentation or nondisclosure in certain pre-filing investigations may be essential. However, Rule 8.4(c) prohibits attorney involvement in "dishonesty, fraud, deceit, or misrepresentation." Because there are no Colorado attorney disciplinary cases to guide a private lawyer's involvement in pretexting in pre-filing investigations, an ethical dilemma arises for attorneys advising clients or engaging investigators. In some cases, a lawyer considering a pretexting investigation must weigh zealous client advocacy and compliance with Rule 11 against compliance with Rule 8.4 at the potential expense of the client.

IP Cases

When one thinks of a covert investigation, some examples that come to mind include undercover operations in law enforcement or use of testers in discrimination cases. However, pretext investigations may be necessary in IP cases. This is why the CBA IP Section approached the Colorado Supreme Court Standing Committee with concerns about attorney involvement in the practice of pretexting.

In IP practice, attorneys sometimes investigate potentially unfair business practices by use of an undercover agent posing as a member of the general public engaging in ordinary business transactions with a suspected infringer. Such investigatory tactics are specifically illustrated in *Apple Corps Ltd., MPL v. Int'l Collectors Soc'y*.[3] The plaintiffs in *Apple* sued to enjoin a marketer and distributor of collectors' stamps from selling postage stamps featuring copyrighted images of The Beatles.[4] A consent order enjoined sale of some stamps but allowed sale of stamps featuring John Lennon's name and image pursuant to a licensing agreement.[5] The plaintiffs could determine compliance with the consent order only by having investigators directly call a hotline that required a specific club membership, pose as consumers, and order the enjoined stamps.[6] Had the investigators disclosed their identity and reason for calling, they would not have been able to determine the ordinary course of business practice of the defendants.

Similarly, in *Gidatex v. Campaniello Imports, Ltd.*,[7] a trademark infringement and unfair competition case, plaintiff's counsel had to hire investigators to pose as interior designers to prove that defendants were luring customers with signs and ads bearing plaintiff's "Seporiti Italia" trademark.[8] Defendants' showrooms and warehouses were open only to "the trade." As the court pointed out, "It would be difficult, if not impossible, to prove a theory of 'palming off' without the ability to record oral sales representations made to consumers."[9]

As shown in these cases, verification of infringement may require direct contact with a target that would not sell the product to someone acting on behalf of the competitor. Accordingly, the IP attorney may be forced to hire an investigator who conceals his or her identity and reason for purchasing a product to obtain the necessary pre-filing evidence to comply with Rule 11.

Acts of misrepresentation or dishonesty, even by a third party, sound the ethics alarm. In particular, Rule 8.4(c) places restrictions on such case preparation by prohibiting attorney involvement in "dishonesty, fraud, deceit or misrepresentation." Faced with limitations on meeting evidentiary and procedural burdens, a Colorado IP attorney is at a disadvantage. Ultimately, these restrictions can diminish the value of a client's IP portfolio.

Recognizing that pretexting may be a necessary investigatory tool in the IP practice, the IP Section sought clarity from the Colorado Supreme Court Standing Committee as to whether such nondisclosure or misrepresentation constitutes ethical violations.

The In re Pautler *Opinion*

The IP Section's inquiry gave rise to the formation of a pretexting subcommittee.[10] The objective of the pretexting subcommittee was to analyze the impact of the Rules of Professional Conduct—specifically Rules 4.1, 4.2, 4.3, 5.3, and 8.4(c)—on the practice of pretexting. Early in its deliberations, the subcommittee expressed concern over the Colorado Supreme Court's position in *In re Pautler*,[11] which addresses attorney involvement in deceptive conduct. The *Pautler* case involved direct misrepresentation by a district attorney to an alleged murder suspect. The Court in *Pautler* affirmed a ruling that the district attorney had violated Rules 4.3 and 8.4(c) when he posed as a public defender to persuade the suspect to surrender.[12]

Even though the district attorney had good reason for his misrepresentation, the Court professed its concern for the reputation of the legal profession and denounced any practices involving deceptive conduct. The Court declared, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so."[13]

Although the Court in *Pautler* focused on the direct action taken by the district attorney, it also suggested that any attorney involvement in deceptive practices is prohibited.[14] For the IP attorney, this broad interpretation of the rule implicates indirect involvement in an investigation to obtain evidence of infringement. For more insight into how to address pretexting, the subcommittee looked to other jurisdictions.

Pretexting in Other Jurisdictions

Most jurisdictions have yet to address the ethical questions surrounding pretexting. The subcommittee identified seventeen jurisdictions where the respective bars have addressed the issue in amendments to the jurisdiction's rules of professional conduct, comments to the rules, or ethics opinions (collectively, bar rules).[15] In addition, the courts in a handful of jurisdictions have addressed pretexting in court opinions. However, the bar rules and court opinions provide no uniformity in their conclusions.

Bar Rules

Although most states that have addressed the issue do not permit direct participation, some permit advisement by either all attorneys (Michigan, North Dakota, Oregon, Virginia, and Wisconsin) or government attorneys only (Alabama, Missouri, and Florida).[16] At least ten states have a rule, a comment, or an ethics opinion suggesting that all attorneys may at least supervise pretext investigations.[17] Another six states (the District of Columbia, Florida, Missouri, South Carolina, Tennessee, and Utah) have a rule, comment, or ethics opinion reaching the conclusion that government attorneys may at least supervise pretext investigations.[18] Some states limit attorney participation in pretexting to "lawful investigative activities," investigations "authorized by law," "lawful intelligence-gathering activity," or by providing that Rule 8.4(c) is not violated unless the misrepresentation "reflects adversely on the lawyer's fitness to practice law.[19]

New York has an ethics opinion permitting "dissemblance" in a small number of exceptional circumstances. These include the investigation of IP rights violations where dissemblance is limited to identity and purpose and involves lawful activity undertaken solely for gathering evidence.[20]

Similar to the New York ethics opinion, and specific to IP infringement, an Alabama ethics opinion permits use of an undercover investigator during pre-litigation investigation.[21] Such investigators may pose as customers under the pretext of seeking products or services of the suspected infringers and may misrepresent their identity and purpose, as long as contact with suspected infringers occurs in the same manner and on the same basis as a member of the general public.[22]

Court Opinions

Courts in other jurisdictions have primarily focused on the type of information gathered and what level of communication takes place to determine whether pretexting constitutes ethical violations. However, "there is a discernible continuum in the cases from clearly impermissible to clearly permissible conduct."[23] Fortunately for the IP lawyer, courts have permitted pretexting conduct in the small number of IP cases they have addressed.

Courts generally permit pretext investigations when communications involve an ordinary course of business transaction. For example, in *Apple Corps*, the U.S. District Court for the District of New Jersey found that: (1) New Jersey RPC 4.2 cannot apply where lawyers and/or their investigators act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation; (2) New Jersey RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes; and (3) the prohibitions of New Jersey RPC 4.3 do not apply to straightforward transactions undertaken solely to determine, in accordance with Rule 11, the existence of a well-founded claim.[24]

The U.S. District Court for the Southern District of New York in *Gidatex* found no violation because the investigators merely interacted with low-level employees without access to attorney–client privileged information and recorded the normal business routine in the showroom and warehouse).[25] Other courts have found ethical violations when the investigations involve trickery, similar to *Pautler*.[26] For example, in *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, the U.S. District Court for the District of South Dakota found that audio recording a salesperson without his knowledge constituted an act of trickery and ethical violations.[27] In the case *In re Gatti*, the Oregon Supreme Court found ethical violations when an attorney posed as a chiropractor to elicit statements evidencing fraud.[28]

The Reports

The arduous research efforts of the pretexting subcommittee resulted in two reports, a Final Report and a Supplemental Report, which include proposed exceptions to Rule 8.4(c) to allow pretext investigations. The accompanying table illustrates the current language of Rule 8.4(c), as well as proposed exceptions to the Rule contained in the reports.

Current Rule 8.4(c) and Proposed Exceptions	
Existing Rule 8.4	Rule 8.4

	It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]
Final Report, Initial Proposed Exception, rejected by the Standing Committee	Rule 8.4 It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *when either;* *(1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (b) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or* *(2)(A) the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering*[.]
Supplemental Report, Majority's Proposed Exception, submitted for review to the Court	Rule 8.4 It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*[.]
Supplemental Report, Minority's Proposed Exception, submitted for review to the Court	Rule 8.4 It is professional misconduct for a lawyer to: . . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, ***except that a lawyer representing the government*** *may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*[.]
Supplemental Report, Minority's Alternative Proposed Exception, submitted for review to the Court	Take no further action.

The Final Report, presented at a January 6, 2012 Standing Committee meeting, includes a single proposed exception to Rule 8.4(c) to permit attorney involvement in pretext investigations. The exception would allow attorneys to direct, advise, or supervise lawful covert activity involving misrepresentation or deceit in specific, detailed circumstances. The Standing Committee rejected the proposal, but asked the subcommittee to study the issue further and solicit input from stakeholders, specifically members of the bar and clients wanting to protect their intellectual property.

The subcommittee drafted a Supplemental Report, which involved consideration of stakeholders' comments[29] to the initial proposal, making Comment or other Rule changes, as well as including in-depth research and discussion.[30] The Supplemental Report includes a revised, simpler exception proposed by the majority, and two alternatives proposed by two minority members who urge that the majority's revised exception is still too broad.

The Majority's Revised Proposed Amendment to Rule 8.4(c)

The majority's revised proposed exception applies only to lawful investigative activities and permits a lawyer to advise, direct, or supervise the activities. The majority excludes direct participation but permits some level of attorney involvement to allow an attorney to oversee an investigation, decreasing the risk of any unlawful conduct. The majority believed that increasing the likelihood of lawful activities protects the public perception of the profession (the leading concern of the *Pautler* Court). The majority's purpose of limiting the proposed exception to "investigative activities" is to exclude noninvestigatory cases most commonly implicating Rule 8.4(c)—for example, when attorneys lie to their clients or misuse client funds.

The subcommittee urges that the most compelling reason for a Colorado-specific rule is the uncertainty resulting from Colorado precedent in the *Pautler* case.[31] *Dicta* in *Pautler* suggest that any involvement in misrepresentation is categorically prohibited, but also suggests that this categorical prohibition may not apply to indirect involvement with covert investigations.[32]

The Minority's Proposal

With a primary focus on the integrity and reputation of the profession, the two-member minority proposed either: (1) a narrower Rule 8.4(c) exception (for a lawyer representing the government only); or (2) no amendment.

The first alternative. The minority would limit the exception to "a lawyer representing the government," thus excluding public defenders and private attorneys.[33] Although deception is not condoned, the minority recognizes that case law and CBA Ethics Committee Formal Opinion 112 imply that law enforcement officers may dissemble.[34] Courts have recognized that ruses are a sometimes necessary element of police work.[35]

The minority departs from the majority because it believes that a civil lawyer involved in lawful pretexting diminishes the profession by instigating investigator dishonesty.[36] The minority also fears that potential abuse in certain civil practice areas (ones involving animosity, such as dissolution of marriage cases) harms the integrity of the profession.[37]

The second alternative. As an alternative option, the minority proposed that the Court take no action. The minority agrees that lawyers are entitled to more guidance as to pretexting, but fears an amendment could weaken the reputation of attorneys and raises a policy issue:

> The public persona of lawyers is already relatively poor, and we are concerned that an amendment that specifically allows a lawyer to direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit will only make this worse.[38]

The minority emphasizes there is no way to verify that enabling lawyers to supervise and advise investigations would reduce potential for improper conduct, as the majority suggests. The minority also reiterates that despite the majority's requirement that such activity must be lawful, the ultimate issue should be dishonesty, not legality.[39] If the broadest language in *Pautler* applies to all supervision of pretext investigations, the minority warns that a proposed change to Rule 8.4(c) could be characterized as a calculated retreat from holding lawyers to the highest standard of honesty.[40]

The Standing Committee

At the July 13, 2012 meeting, the Standing Committee met with the subcommittee and other interested parties to discuss the Supplemental Report. Following presentations of the proposals, the Standing Committee had close votes on the following: the majority's proposal, the minority's first alternative, the minority's second alternative, and a proposal to develop a Comment. Only the minority's second alternative (make no changes) was successful. However, the Standing Committee adopted a motion to provide minutes from all the meetings and the subcommittee's Final Report and Supplemental Report to the Court for review.

Advocates for Change

As reflected in the subcommittee's proposals, most stakeholders advocate for an exception to the Rule. For private attorneys, pretext investigations may be the only way to evidence illegal deception or fraud, such as trademark counterfeiting or housing discrimination.[41] Specific to IP practice, stakeholders believe change is warranted because Rule 8.4(c) may prevent appropriate pre-filing investigation.

As one stakeholder points out, "Rule 8.4(c) may have the unintended effects of materially hampering the protection of intellectual property rights and decreasing the value of intellectual property."[42] Another stakeholder warns:

> [T]he consequence of rejecting a limited amendment will not [be to] render such investigations unlawful but it will prevent organizations from employing their attorneys in an oversight role to help ensure that such investigations are conducted in a lawful and ethical manner.[43]

In addition to fears of diminishing the reputation of the profession, stakeholder opposition to proposed amendments includes concern over dissimilarity with the ABA Model Rules. However, the Standing Committee has recommended and the Court has adopted several rule changes over the past several years. Although uniformity among the state Bars is favored, there are exceptions, such as when

Colorado law or public policy (for example, enforcing IP rights) justifies departure, or if the Standing Committee recommends a better rule.

Despite such input from stakeholders, the Supreme Court has not taken steps to review the work product submitted from the Standing Committee. Recently, the U.S. District Court for the District of Colorado reviewed alleged acts of professional misconduct in a pretexting matter, but provided no direct guidance. In *FTC v. Dalbey*, the defendants alleged improper conduct by FTC counsel when an FTC investigator, under the direction of counsel, posed as a prospective customer, calling employees of the defendants and surreptitiously recording conversations.[44] The defendants alleged such practice was contrary to Ethics Opinion 112, in which the Committee interpreted Rule 8.4(c) and Rule 5.3 to apply to surreptitious recordings.[45] The Court found the FTC counsel, who was licensed in jurisdictions authorizing undercover calls, had a good faith (but false) belief that the conduct was authorized.[46] Also, the Court determined there was lack of prejudice because the calls were not used in summary judgment papers.[47] In conclusion, the Court declined to issue sanctions and recommended that defendants report suspected ethical violations to the Office of Attorney Regulation Counsel, an "appropriate forum to determine whether an ethical breach has occurred and, if so, what sanction should be imposed."[48]

Conclusion

In light of the *Pautler* opinion, the language of Rule 8.4(c), lack of applicable case law, and demand for attorney involvement in pretexting, the prevailing consensus is that attorneys would benefit from rules that provide clear guidance for their conduct. However, there is little indication if and when the Colorado Supreme Court will attempt to resolve the ethical uncertainties raised by pretext investigations.

For now, there are competing positions that the Colorado IP attorney contemplating a pre-filing investigation should consider. On the one hand, as supporters for Rule amendments argue, attorney involvement may improve accountability and decrease unlawful conduct. On the other hand, those in opposition to the rule amendments fear abuse by attorneys, as well as a declaration from the Court to the public condoning deceptive conduct by lawyers.

Although attorneys share a common goal of promoting the image of the bar and adhering to the highest ethical standards, pretexting may be necessary as an investigatory tool to best advocate for a client. Until case law develops or rule modifications occur, the Colorado IP attorney may be left choosing between upholding the reputation of the profession or effective client advocacy and ultimately risking potential sanction.

Notes

1. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

2. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

3. *Apple Corps Ltd., MPL v. Int'l Collectors Soc'y*, 15 F.Supp.2d 456 (D.N.J. 1998).

4. *Id.*

5. *Id.* at 460.

6. *Id.* (The investigators included plaintiffs' counsel, her secretary, her co-counsel's stepson, and an associate's husband.)

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

8. *Id.* at 124.

9. *Id.*

10. The pretexting subcommittee members of the Colorado Supreme Court Standing Committee included Tom Downey (chair), H. Berkman, J. Haried, M. Hirsch, A. Rocque, A. Rothrock, A. Scoville, D. Stark, J. Sudler, J. Webb, and J. Zavislan.

11. *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002) (sanctioning deputy district attorney for misrepresenting that he was a public defender to a barricaded and armed murder suspect in the context of surrender negotiations).

12. *Id.*

13. *Id.*

14. *Id.*

15. *See* Downey *et al.*, Supplemental Report of the Pretexting Subcommittee, www.cobar.org/repository/Inside_Bar/FamilyLaw/FLS%202%20pretext%20subcom.pdf at Attachment B (reporting deviation from ABA Model Rules of Professional Conduct in Alabama, Alaska, the District of Columbia, Florida, Iowa, Michigan, Missouri, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, Tennessee, Utah, Virginia, and Wisconsin).

16. *See id.* at 8 and Attachment B.

17. *Id.*

18. *Id.* at 8.

19. *Id.* at 7.

20. *See* New York County Op. 737 (May 23, 2007).

21. *See* Alabama Ethics Opinion RO-2007-05 (adopting the rationale and holdings of *Apple*, 15 F.Supp.2d 456 and *Gidatex*, 82 F.Supp.2d 119).

22. *Id.*

23. *See Hill v. Shell Oil Co.*, 209 F.Supp.2d 876, 880 (N.D.Ill. 2002).

24. *Apple Corps*, 15 F.Supp.2d at 474-76.

25. *Gidatex*, 82 F.Supp.2d at 122.

26. *Pautler*, 47 P.3d at 1183.

27. *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp.2d 1147, 1155-60 (D.S.D. 2001).

28. *In re Gatti*, 8 P.3d 966, 976 (Or. 2000).

29. The stakeholders that submitted comments include the Attorney General of Colorado; Colorado Criminal Defense Bar; Colorado District Attorney's Council; CBA Family Law Section; CBA Intellectual Property Section; International Trademark Association; Marksmen; Office of the Federal Public Defender, Districts of Colorado and Wyoming; Office of the State Public Defender; Oracle Corporation; RE/MAX, LLC; Standing Committee of the Criminal Justice Act Panel, U.S. District Court for the District of Colorado; State of Colorado, Office of the Alternate Defense Counsel; and U.S. Department of Justice, U.S. Attorney, District of Colorado.

30. *See* Downey, *supra* note 15.

31. *Id.*

32. *Compare Paulter*, 479 P.3d at 1182 *with id.* at 1179 and n.4.

33. *See* Missouri Rule 8.4(c) (recently amended to include an exception for a lawyer "for a criminal law enforcement agency, regulatory agency, or state attorney general," who may "advise others about" or "supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations").

34. *See* Downey, *supra* note 15 at 32.

35. *People v. Zamora*, 940 P.2d 939, 942 (Colo.App. 1996).

36. *See* Downey, *supra* note 15 at 35.

37. *Id.* at 36.

38. *Id.* at 37-38 and CBA Family Law Section Comment. *See also Pautler*, 47 P.3d at 1175:

> Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession—as well as at the heart of the system of justice.

39. *See* Downey, *supra* note 15 at 38.

40. *See id.* at 40.

41. *See id.* at 29, INTA Comment ("[S]uch investigations may be used to gather evidence not otherwise discoverable. . . .").

42. *Id.* at CBA Intellectual Property Law Section Comment at 2.

43. *Id.* at RE/MAX Comment at 2.

44. *FTC v. Dalbey*, 2013 WL 941821 (D.Colo. 2013).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

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