COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

January 11, 2019, 9:00 a.m.
2 East 14th Ave., Conference Room 1-B
Call-in number: 720-625-5050 or (toll free) 1-888-604-0017
Access Code: 87835555#
WiFi Access Code: To be provided at the meeting

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1. Approval of minutes for October 19, 2018 meeting [pp. 1 - 5]
2. Report from Rule 8.4(g) Subcommittee [Judge Webb and Jessica Yates, pp. 6 - 22]
3. Report from Rule 8.4(c) Subcommittee [Tom Downey, pp. 23 - 25]
4. Report from Contingent Fee Subcommittee [Alec Rothrock]
5. Report from ABA Advertising Amendments Subcommittee [Eli Wald]
6. Administrative matters:
   a. Select next meeting date
7. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On October 19, 2018
(Fifty-second Meeting of the Full Committee)

The fifty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, October 19, 2018, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Chair Marcy G. Glenn and Justice William W. Hood III, were Committee members Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Judge Adam J. Espinosa, Lino Lipinsky de Orlov, David C. Little, Judge William R. Lucero, Judge Ruthanne Polidori, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Jessica E. Yates. Present by conference telephone were members Thomas E. Downey, Jr., Henry R. Reeve, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Justice Monica M. Márquez and members Judge Michael H. Berger, Margaret B. Funk, John M. Haried, and Frederick R. Yarger. Absent were members Boston H. Stanton, Jr., David C. Little, Cecil E. Morris, Jr., and Lisa M. Wayne. Also present were Supreme Court staff attorneys Kathryn Michaels and Jennifer J. Wallace.

Present as a guest was Noah Patterson of the Office of the Colorado Attorney General.

The Committee joined the Chair in congratulating Lino Lipinsky upon his selection by Governor John Hickenlooper to serve on the Colorado Court of Appeals, an appointment that will become effective on January 8, 2019.

I. *Subcommittee on Rule 8.4(c).*

The Chair called on member Thomas E. Downey, Jr. to bring the Committee up to date on the activities of the "pretexting" subcommittee that Downey chairs. In doing so, the Chair noted that the subcommittee had been reconvened to consider the adoption of a comment to Rule 8.4(c) to deal with "pretexting." She explained that the provision currently defines professional misconduct to include engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," but with the exception "that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities"; concern had been expressed that pretexting might not be considered a "lawful investigative activity."

Downey replied that his report this day would be the same as that which he gave to the Committee at its fifty-first meeting, on July 27, 2018, which he said had been accurately reported in the minutes of that meeting. Downey forecast that the subcommittee would have more to report at the next Committee meeting.

II. *Meeting Materials; Minutes of July 27, 2018, Meeting, the Fifty-first Meeting of the Committee.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fifty-first meeting of the Committee, held on July 27, 2018. Those minutes were approved with one correction, in the spelling of a name.

III. *Subcommittee on a Rule for Contingent Fee Agreements.*

Member Alexander R. Rothrock reported that the subcommittee that is considering the matter of contingent fee agreements had no presentation for this meeting.

The Chair added that member Rothrock had become engaged to be married, an announcement that was met by a vigorous round of applause from the members.

IV. *Proposed Amendments to Rule 1.5 Regarding Flat Fee Agreements.*

The Chair reported that she had sent to the Court this Committee's proposal for amendments to Rule 1.5, dealing with flat fee agreements. Justice Hood remarked that the Court had not yet set a schedule for receiving public comments upon, and for itself considering, the Committee's submission but that it will do so.[1]

V. *Amendments to American Bar Association Model Advertising Rules, Rules 7.1 through 7.5*.

In the materials provided to the members for this meeting, the Chair had included a copy of a summary authored by the American Bar Association Standing Committee on Ethics and Professional Responsibility regarding amendments to Rules 7.1 through 7.5 of the ABA Model Rules of Professional Conduct, which the ABA House of Delegates adopted at its meeting in August 2018. The summary was accompanied by a redlined version of those amendments, as they appeared in the House of Delegates' Resolution and Report.

The Chair reminded the members that the Colorado version of the advertising rules are already considerably different from the existing ABA version. She advised the Committee that member Eli Wald had agreed to chair a subcommittee to consider the ABA amendments. And she invited discussion about the material that had been provided to the Committee.

A member commented that, if the Committee embarks on a review of the Colorado advertising rules, it should look not only at the ABA amendments but also at the extensive report

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1. Subsequently to the meeting, the Court announced a period for receipt of public comment on the Committee's flat fee proposal, ending on January 16, 2019. *See* https://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm:

> Deadline for Comments: January 16, 2019 at 5 p.m.
>
> The Colorado Supreme Court requests written public comments by any interested person on the proposed amendments to Rule 1.5 and Comment to Rule 1.5 of the Colorado Rules of Professional Conduct, and Proposed Form Flat Fee Agreement. Written comments should be submitted to Cheryl Stevens, Clerk of the Supreme Court. Comments may be mailed or delivered to 2 East 14th Avenue, Denver, CO 80203 or emailed to cheryl.stevens@judicial.state.co.us no later than 5:00 p.m. on January 16, 2019. The Clerk will post written comments here after the comment period closes.
>
> –Secretary

issued by the Association of Professional Responsibility Lawyers in 2015[2] about what was then a proposal for those amendments to the ABA model rules; the member understood that the National Association of Bar Counsel has agreed with the APRL report and with the ABA amendments. This member noted that it would be helpful to the Committee to consider the APRL report input in order to understand fully the intent behind the ABA amendments.

Another member recalled that the Colorado Bar Association had once undertaken to write an ethics opinion on the topic of lawyer advertising but had abandoned that effort. He suggested that our Committee reach out to that ethics committee and to other bar groups to seek input on the ABA amendments. He added that there is a component of the bar that publicly advertises legal services and spends time and money doing so. He understood the purpose of the ABA amendments was to make such advertising "less problematic" (to use his words); this Committee might want to involve lawyers who do such advertising as it considers the ABA amendments.

Two other members responded to that suggestion by identifying some specific legal organizations to which offers to participate might be extended; one member also suggested looking in the Yellow Pages to identify lawyers who make significant use of advertising.

But another member stated his opposition to inclusion of other groups in this Committee's consideration of the ABA amendments. He recalled a couple of previous occasions in which the Committee invited the participation of particular factions within the bar in the drafting of some rules — invitations that, in this member's characterization, each "turned into a complete disaster." This member did not believe that it would be necessary or useful to invite to the Committee's deliberations lawyers that happen to be advertisers of their services. He added that he had himself represented lawyers who have been among the most prolific advertisers and that he had no personal opposition to such advertising. But he believed that inviting them to participate in the Committee's discussions as a special interest group invited problems; he distinguished the kind of participation to which he was objecting from written comments from such groups to the Committee, about the ABA amendments, for the Committee's consideration. He prophesied that the Committee would prepare many drafts in the course of its work on the ABA amendments and that it might at some stage in that process want to expose its deliberations and its draft product in a publication such as *The Colorado Lawyer*, inviting written comment. But he quite definitely did not want to be harangued by direct participation of such interest groups in the Committee's efforts. That could be left to the public comment period that would be provided by the Court itself following receipt of a proposal from the Committee.

To that, the member who had previously suggested the involvement of lawyers who advertise in the Committee's consideration of the ABA amendments said he had more in mind the approach taken by the Committee when it previously considered the pretexting exception added to Rule 8.4(c) relating to lawful investigative activities, when, he recalled, the Committee had engaged the United States Attorney's office in its discussions. And, he added, while it might not be appropriate to include the lawyer advertising community in the Committee's initial discussions of the ABA amendments and in its initial drafting efforts, it might be useful to do so when the drafting effort had proceeded toward a final product that would be submitted to the Court.

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2. The report is available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.pdf. *–Secretary*

Another member joined this discussion by recalling that the Committee had invited bankers to participate in the development of the COLTAF principles that became the Rule 1.15 series of rules. In that circumstance, the Committee sought the special expertise of bankers regarding the special bank accounts that those rules require lawyers to maintain when they hold funds that belong to others. Maybe, this member suggested, this matter of advertising is another area where the Committee does not itself have all of the necessary expertise to understand the import of any rules changes it might propose.

The member who had earlier suggested consideration of the positions taken by bar counsel on the ABA amendments now added her view that it would be important for the Committee to have the participation, in some fashion, of lawyers who advertise. She noted that the Colorado Trial Lawyers Association has a division between those who advertise their services and those who do not. Waiting until the end of the Committee's consideration of the ABA amendments before involving others in the drafting process ran the risk of omitting important, valuable ideas that could have been more easily included in the Committee's product if they had been considered early in its efforts.

Member Wald, who is to chair the subcommittee that will undertake the first stages of the Committee's efforts, said he would be glad to try to handle the effectuation of these ideas as he directed that subcommittee. Referring to the recollections of the member who spoke of prior difficulties experienced by the Committee when it invited outside groups to participate in other drafting efforts, Wald suggested that it might be sensible to invite the Colorado Trial Lawyers Association to send representatives from both of its factions — those who advertise and those who oppose advertising — to participate in the subcommittee's drafting efforts, while avoiding being overwhelmed by "twenty or so" participants. Wald concluded his remarks by saying he shared the views of the members who had thought it useful to invite the participation, in some fashion, of lawyers who do advertise their services, in order to have their insights.

It was noted that eight members have already agreed to participate on Wald's subcommittee.

VI. *Consideration of Lawyer Conduct Involving Harassment*.

The Chair had provided, in the materials for this meeting, an excerpt from Part V of the minutes of the Committee's forty-seventh meeting, on June 16, 2017, at which it considered what was then the recent adoption by the American Bar Association of Model Rule 8.4(g), which provision reads—

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) 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.

As reported in those minutes, after some discussion of the ABA provision and note of the fact that no other jurisdiction had then adopted the ABA text — and that Colorado has existing case law on

the matter of sexual harassment within a law firm[3] — the Committee decided at that forty-seventh meeting to "let the matter percolate."

The Chair characterized that earlier decision of the Committee to be a reflection of the fact that Colorado has a rule on harassment that is both larger and more narrow than what the ABA was then offering as its new Rule 8.4(g), as well as a reflection of concerns that had been expressed in other fora that the ABA rule was either unwise or even unconstitutional. The Committee had decided, at that forty-seventh meeting, not to be in the forefront on this matter, she said.

But, in the intervening months, there have been many developments in the area of sexual harassment, including the growth of the #MeToo movement, as well as expression of concerns about the constitutionality of efforts to regulate such conduct. The Chair asked whether the Committee now thought this matter should be reconsidered, commencing with the formation of a subcommittee for that purpose.

A member asked member Jessica Yates, who is Colorado's Attorney Regulation Counsel, whether there is a sense that the legal profession would be acting to protect itself by not adopting the ABA's provision. To that question, Yates referred to the testimony of the Colorado Secretary of State in March 2018 on Colorado House Bill 18-1152 in the context of a broader effort to legislate harassment. And she added that her office had received a complaint regarding the conduct of a municipal judge, a complaint that was eventually dismissed.[4]

And, at this point, at 9:30 a.m., the meeting was informally adjourned in response to an emergency evacuation of the entire Ralph Carr Justice Center.

[Following the meeting, the Chair advised the Secretary that (1) member Judge John Webb had advised the Chair, before the meeting, that he was willing to chair a reconvened subcommittee to consider amendment of Rule 8.4(g), and (2) in an informal gathering of some of the members during the evacuation, member Jessica Yates agreed to co-chair the reconvened subcommittee with Judge Webb.]

VII. *Adjournment; Next Scheduled Meeting.*

As just noted, the meeting was informally adjourned at 9:30 a.m. The next scheduled meeting of the Committee will be on Friday, January 11, 2019, beginning at 9:00 a.m., in the Conference Room 1-B of the Ralph L. Carr Judicial Center, unless otherwise announced.

RESPECTFULLY SUBMITTED,

Anthony van Westrum

[*These submitted minutes have not yet been approved by the Committee*.]

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3. People v. Lowery, 894 P.2d 758 (Colo.1995). –Secretary

4. Colorado Attorney Regulation Counsel does not have jurisdiction over a complaint against a municipal judge. –Secretary

TO: STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

FROM: RULE 8.4(g) SEXUAL HARASSMENT SUBCOMMITTEE

DATE: JANUARY 3, 2018

For discussion at the January 11, 2019, meeting, the subcommittee respectfully submits the following report.

Recommendation

The subcommittee proposes a new Rule 8.4(i). Although unanimity on the exact language was not achieved, the subcommittee proposes two versions to frame the discussion:

> (i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment that is directed at any person with whom the lawyer has a professional relationship.

> (i) Engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment that is directed at any person with whom the lawyer has contact through the practice of law or with whom the lawyer otherwise has a professional relationship.

The subcommittee unanimously proposes the following comment:

> Comment [ ] Sexual harassment may include, but is not limited to, sexual advances, requests

> for sexual favors, and other verbal or physical conduct of a sexual nature that is reasonably interpreted as unwelcome. "Professional relationship" is not limited to the attorney-client relationship. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide application of paragraph (i).

The first sentence closely parallels Comment [4] to Canon 2, Rule 2.3, of the Colorado Code of Judicial Conduct. The phrase "is reasonably interpreted" derives from the Code of Conduct for United States Judges.

Background

In August 2016, the ABA's House of Delegates approved by voice vote Model Rule 8.4(g), which addressed discrimination and harassment, including sexual harassment, related to the practice of law. The Model Rule has been the subject of extensive commentary and some controversy, including First Amendment concerns. *See* Stephen Gillers, "A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)," 30 Georgetown Journal of Legal Ethics 195.

Shortly after approval of the Model Rule, the standing committee formed a subcommittee to evaluate it. Early on, the

subcommittee was divided, with several members favoring no action, at least until other states had taken positions. The standing committee adopted that view.

Only one state has adopted the Model Rule, although a few had preexisting analogous rules.[1] See https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf. Apparently, four or five states have rejected it. See https://www.law360.com/legalethics/articles/1091613/the-aba-was-dead-wrong-about-model-rule-8-4-g-?nl_pk=723a5f59-4ab6-47f6-a353-6d39c4329144&utm_source=newsletter&utm_medium=email&utm_campaign=legalethics. A few jurisdictions have addressed sexual harassment by comment.[2]

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[1] For example, in Iowa, "(g) engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so."

[2] In Maryland, "[3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate section (d) or (e) of this Rule. This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. *See Attorney Grievance Commission v. Goldsborough*, 330 Md. 342 (1993). *See also* Rule 19-301.7 (1.7)."

Even so, recently liaison justices Marquez and Hood requested the standing committee to take a second look at addressing sexual harassment in Rule 8.4. As well, OARC has concerns that while sexual harassment might be prosecutable under existing RPC 8.4(d) or (h),[3] or even RPC 8.4(b) if it rose to the level of criminal conduct, a specific reference to sexual harassment would afford practitioners better notice.

Subcommittee Considerations

The subcommittee considered adding a comment to Rule 8.4(g) explaining that sexual harassment could constitute "bias against a person on account of that person's . . . gender." The subcommittee also considered adding a comment to Rule 8.4(h) that sexual harassment could be conduct that "directly, intentionally, and wrongfully harms others." The subcommittee rejected these approaches for three reasons.

First, the supreme court has disfavored imposing discipline based on a comment rather than a rule. *See Matter of Gilbert*, 2015

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[3] See attached case compilation.

CO 22, ¶ 33, 346 P.3d 1018, 1026. Second, Rule 8.4(g) is limited to conduct "in the representation of a client," which as discussed below, the subcommittee felt was too narrow.[4] Third, relegating sexual harassment to a comment diminishes its significance and provides only limited notice to practitioners.

Turning to the language of a new rule, the subcommittee considered whether to proscribe conduct that permitted or ratified sexual harassment, notwithstanding Rules 5.1 and 5.3. For example, a member questioned whether the rule should address persons who share the same level of authority, such as one partner who does nothing despite knowing that another partner is committing sexual harassment. However, the subcommittee felt that the "blind eye" scenario was best addressed through Rule 5.1(c).

This member also noted that if one deputy public defender or assistant district attorney knows that his or her supervisor is engaging in harassment, the proposed rule imposes no obligation to "call it out." The subcommittee was concerned that creating such

[4] The subcommittee noted that Rule 8.4(g) might be due for review, as it does not include gender identity or marital status.

an obligation would force the subordinate to choose between the risk of professional discipline for remaining silent and the risk of retaliation by the supervisor.

The subcommittee adopted the mens rea phrase ("knows or reasonably should know") from the Model Rule. The subcommittee felt that this language would create an objective standard, allaying concerns that mere allegations of verbal conduct would be sufficient proof of a rule violation. Further, the "knows or reasonably should know" standard is used in various other rules. *See, e.g.,* Rule 4.3 (incorporating that standard with respect to a lawyer's duties in dealing with an unrepresented person who may misunderstand the lawyer's role in the matter); Rule 1.13(f) (imposing additional communication duties on a lawyer representing an organizational client when the "lawyer knows or reasonably should know that the organization's interests are adverse" to the internal or external constituents of an organization with whom the lawyer is dealing).

Next, the subcommittee took up the difficult question of a scope limitation. The subcommittee considered four possibilities, recognizing that different phrases also tended to suggest different contexts in which harassment could occur, including the

workplace, judicial proceedings, and meetings with clients, other lawyers, or third parties.

- Most restrictive is "in the representation of a client," the limitation in RPC 8.4(g). See also RPC 4.1.
- Slightly less restrictive are "professional relationship" and "in the practice of law."
- Broader still may be the Model Rule, "related to the practice of law."
- And least restrictive is no limitation at all, akin to RPC 8.4(b) or (c).

All members agreed that "in the representation of a client" was too narrow. Recognizing that sexual harassment is primarily an employment law principle, the members pointed out that some actions taken by a lawyer as an employer might not be in the representation of a client.

Of the members favoring some scope limitation, these members felt that "professional relationship" would cover more scenarios where the lawyer was acting as an employer, including dealing with an independent contractor to the lawyer's firm. However, some members felt that to reach all scenarios involving

the lawyer acting at least in some capacity as a lawyer or employer, "in the practice of law" should be added. Regardless, most members believed some sort of scope limitation was appropriate, and "related to the practice of law" was uncertain in scope and arguably embraced no limitation at all.

Initially, the subcommittee was divided between "professional relationship" and/or "in the practice of law" and no restriction. Members favoring the latter pointed out that sexual harassment can be as serious as the conduct proscribed in RPC 8.4(c), which is not so limited. They were concerned that the ambit of scope limitations such as "professional relationship" of "in the practice of law" would be difficult to predict at the margins.

Members favoring a scope or context limitation noted that most physical sexual harassment would be criminal conduct regulated by Rule 8.4(b) or 8.4(h). *See*, *e.g.*, § 18-9-111, C.R.S. 2018. By contrast, they were concerned that extending the more elusive concept of verbal sexual harassment to all aspects of a lawyer's nonprofessional life could lead to discipline over conduct where a disparity in power did not exist, primarily in purely social settings. These members reiterated the vagueness and overbreadth

objections to the Model Rule raised by attorneys general in several states. Ultimately, the subcommittee unanimously recommends a scope limitation, consistent with one or the other versions proposed.

As discussed, some members remained troubled over scenarios where "professional relationship" might be too narrow. To this end, the subcommittee added to the comment the second sentence, "'Professional relationship' is not limited to the attorney-client relationship." This sentence is consistent with RPC 7.3(a)(2) and comment [5] to RPC 7.6, which suggest that "professional relationship" is intended to be broader than the attorney-client relationship. And the third sentence was added to emphasize the employer-employee aspect of such relationships. Members who disfavored the "in the practice of law" language believed that this third sentence would extend "professional relationship" to most, and probably all, dealings between a lawyer and employees or independent contractors, as well as professional interactions with clients, judicial staff, other lawyers, and third parties.

/s/ John R. Webb

Subcommittee co-chair

Sexual Harassment Attorney Discipline Case Compilation

Draft research by Jessica Yates for the 8.4(g) Subcommittee of the Standing Committee on the Rules of Professional Conduct

This compilation focuses on cases involving attorney discipline based on sexual harassment of non-clients. There also are cases (*e.g. Matter of Piatt*, 951 P.2d 889 (Ariz. 1997), *In re Ashy*, 721 So.2d 859 (La. 1998), *In re Yarborough*, 524 S.E.2d 100 (S.C. 1999)) involving attorneys' unwanted advances solely toward clients that have resulted in discipline as well, even if there was no sexual relationship with the clients. These are not summarized below.

People v. Lowery, 894 P.2d 758, 760 (Colo. 1995): Attorney disciplined for pattern of sexual misconduct and harassment against employees. Conduct included sexually graphic remarks, grabbing of hips, grabbing one employees' crotch, and forcible kissing. The matter was prosecuted under the former rules: DR 1-102(A)(6) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law). The Court specifically stated:

> The power a lawyer holds over the sexually exploited employee derives from the lawyer's license to practice law. The board found by clear and convincing evidence that the respondent's sexual misconduct involved non-consensual physical as well as verbal abuse. As we observed in *Crossman*, 850 P.2d at 710-11, "[w]e agree with the Supreme Court of Florida that '[i]mproprieties that directly and intentionally harm others

> *always* are serious offenses in the eyes of this Court.' *Florida Bar v. Samaha*, 557 So.2d 1349, 1350 (Fla.1990) (emphasis in original)." We therefore reject the respondent's arguments to the effect that the sexual mistreatment of his employees constituted relatively minor misconduct warranting the imposition of a private censure.

Lowery, 894 P.2d at 759.

People v. Bauder, 941 P.2d 282 (Colo. 1997): An attorney was found to have solicited sex from both the wife and a girlfriend of a client who had hired the attorney to represent him in a divorce proceeding, and there was evidence the attorney inquired about the price he would be charged. The hearing board found that he violated Rules 1.7(b) and 8.4(b), the latter by classifying the conduct as solicitation for the purpose of prostitution, a class 3 misdemeanor. The Supreme Court rejected a private censure given that the conduct was not "merely negligent" and imposed a public censure.

In re Tenenbaum, 800 A.2d 1025 (Del. 2005): Sexual harassment conduct targeting both clients and employees prosecuted under 8.4(b). The matter involved offensive touching, which was deemed criminal conduct based on a Delaware code criminalizing certain sexual harassment.

Disciplinary Counsel v. Skolnick, 153 Ohio St. 3d 283 (Ohio 2018): Attorney stipulated to 8.4(h) violation based on pervasive harassment against employee

over a two year period. Ohio R.P.C. 8.4(h) states it is professional misconduct to "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."

Iowa Sup. Ct. Atty. Disciplinary Board v. Moothart, 860 N.W.2d 598 (Iowa 2015): interpreted the phrase in Iowa R.P.C. 32:8.4(g) "sexual harassment…in the practice of law" – **emphasis added below** – and concluded that the attorney's repeated sexual comments to employees were proved to be a violation of the rule:

> We first note that the rule utilizes the comparatively broad phrase "in the practice of law." We have noted that this language is "quite broad." *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Steffes*, 588 N.W.2d 121, 124 (Iowa 1999). We think the language makes it clear that the rule may be violated even if there is no attorney–client relationship between the lawyer and the person subject to sexual harassment, as long as the attorney is engaged in the practice of law. ***The rule may be violated if a lawyer sexually harasses witnesses, court personnel, law partners, law-office employees, or other third parties that come into contact with a lawyer engaged in the practice of law.*** *See id.* Cases from other jurisdictions prior to Iowa's adoption of rule 32:8.4(g) have for some time held that sexual harassment against non-clients violated more general ethical rules. *See, e.g., People v. Lowery*, 894 P.2d 758, 760 (Colo.1995) (en banc) (sexual harassment of employees); *In re Discipline*

of Peters, 428 N.W.2d 375, 376, 381–82 (Minn. 1988) (sexual harassment of employees and law students); In re Gould, 4 A.D.2d 174, 176, 164 N.Y.S.2d 48 (N.Y.App.Div.1957) (per curiam) (sexual harassment of job applicants). Clearly, the adoption of rule 32:8.4(g), which explicitly prohibits sexual harassment in the practice of law, was designed to strengthen, and not limit, the application of ethical rules in the sexual harassment context. *See Steffes*, 588 N.W.2d at 124.

Second, we consider what is meant by the term "sexual harassment." In briefing before the commission, Moothart offers a narrow definition of sexual harassment borrowed largely from employment law. Citing Equal Employment Opportunity Commission guidelines, 29 C.F.R. § 1604.11 (1980), Moothart asserts that sexual harassment must be unwelcome and must be more than an occasional stray comment. The Board counters that Moothart's definition of sexual harassment is too narrow and out of context. According to the Board, our cases indicate sexual harassment can include any physical or verbal act of a sexual nature that has no legitimate place in a legal setting. *See Steffes*, 588 N.W.2d at 124 (noting that rule regarding sexual harassment was adopted in response to recommendation made by the Equality in the Courts Task Force, which examined "discriminatory treatment received by women in the courtroom and from the legal system in general" (citing Equality in the Cts. Task Force, State of Iowa, Final Report 41–92 (1993))). The commission agreed with the Board's approach. So do we.

> *In Steffes*, we emphasized the breadth of the term "sexual harassment" used in rule 32:8.4(g). *Id.* We stated sexual harassment as used in the rule includes " 'sexual advances, requests for sexual favors, and other verbal [or] physical conduct of a sexual nature.' " *Id.* (quoting Black's Law Dictionary 1375 (6th ed.1990***)). We have not required that the harassment be ongoing or pervasive as has been required in some employment contexts.*** *See, e.g., id.* at 124–25 (deeming sexually revealing photos allegedly documenting back injury conduct of a sexual nature, thereby constituting sexual harassment).
>
> *Moothart*, 860 N.W.2d at 603-604.

State v. Watkins, 914 N.W.2d 827 (Iowa 2018): In the different context of an action to remove a publicly elected county attorney from his office for sexual harassment, the Court drew a distinction between the standards for deciding whether the conduct would be a violation of the Rules of Professional Conduct and the standards for deciding whether the official should be removed for a hostile workplace claim. The distinction drawn suggests that having a bad/evil purpose is ***not*** an element of Iowa's 8.4(g) rule. "We have defined the term 'sexual harassment' in the context of professional misconduct cases to 'include any physical or verbal act of a sexual nature that has no legitimate place in a legal setting.' The standard for sexual harassment established under the rules does not include the necessary analysis of the accused's intent that is required in the removal context to determine whether the accused acted

'intentionally, deliberately, with a bad or evil purpose, contrary to a known duty.'" *Id.* at 842 (citing *Moothart,* 860 N.W.2d at 604; other citation omitted).

In re Brown, 703 N.E.2d 1041 (Ind. 1998): Attorney serving as elected clerk was found to have violated 8.4(d), acts prejudicial to the administration of justice, given evidence of inappropriate and unwelcome sexual advances at work. "The evidence also reveals that some of his employees quit their jobs because of the respondent's advances. Further, reports of the allegations of misconduct in his office would tend to impact negatively the public's perception of the judiciary. As such, we find that his acts were prejudicial to the administration of justice, regardless of whether they satisfy any formal legal definition of 'sexual harassment.'" *Id.* at 1044.

Attorney Grievance Comm'n of Maryland v. Goldsborough, 330 Md. 342, 359, 624 A.2d 503, 511 (1993): Rule 8.4(d) charge (conduct prejudicial to the administration of justice) and violation finding affirmed where attorney sexually harassed both a client and employee:

> Goldsborough contends that whether Rule 8.4(d) is constitutional or not, his conduct is simply not proscribed by the Rule. The Comment to Rule 8.4 of the Maryland Rules of Professional Conduct, he notes, provides that "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."

(Goldsborough's emphasis). We can only surmise that Goldsborough suggests we should view the nonconsensual kissing of clients and spanking of clients and employees as not "relevant to law practice." We do not agree. Goldsborough's actions, particularly with respect to his clients Catharine Sweitzer and Peggy Porter, are directly relevant to law practice.

State ex rel. Oklahoma Bar Ass'n v. Miskovsky, 1997 OK 55, 938 P.2d 744, 749: Parties stipulated that attorney had engaged in sexually harassing comments to prospective clients seeking divorce/pattern of behavior. Court found violations of 8.4(d), conduct prejudicial to the administration of justice, as well as 8.4(a).

In re Depew, 237 P.3d 24 (Kan. 2010): Hearing panel determined that attorney violated Rule 8.4d) (engaging in conduct prejudicial to the administration of justice and 8.4(g) (engaging in "conduct adversely reflect[ing] on the lawyer's fitness to practice law") when attorney with part-time private practice and part-time municipal court judge role sexually harassed five female administrative assistance of district court judges. The 8.4(g) violation was premised on exposing himself, grabbing the assistants, and sending digital photos of his genitals.

Matter of Discipline of Peters, 428 N.W.2d 375 (Minn. 1988): Dean of law school "repeatedly engaged in unwelcome physical contact and verbal communication of a sexual nature against four women employees, two of whom were also law students." *Id.* at 376. The Court agreed that "respondent's conduct adversely reflects on his fitness to practice law in violation of DR 1–102(A)(6)." The Court specifically rejected an argument that only conduct within the attorney-client relationship should be subject to discipline under the Code of Professional Responsibility. The Court focused on the "abuse of power" inherent in the dean's position.

Report of R.P.C. 8.4(c) Comment Subcommittee

The Rule 8.4(c) Comment Subcommittee respectfully submits the following report.

I. SUMMARY

This subcommittee was formed at the October 27, 2017 meeting of the full Committee and tasked to consider whether a comment on the phrase "lawful investigative activities" was necessary, and to consider changing the wording of Rule 8.4(c) to eliminate the word "or", which appears before the word "investigators," and replace it with the word "and".

The following individuals served as members of the subcommittee: Andrea Anderson, David Stark, Dick Reeve, Fred Yarger, Jamie Sudler, Jan Zavislan, John Haried, John Posthumus, the Hon. John Webb, Marcus Squarrell, Margaret Funk, Matthew Kirsch, the Hon. Michael Berger, the Hon. Ruthanne Polidori, Adam Scoville and Tom Downey

The subcommittee recommended replacing the word "or" with the word "and" as it appears before the word "investigators," in the text of Rule 8.4(c). This recommended change was adopted by the full Committee at its meeting on January 26, 2018.

The subcommittee does not recommend the adoption of a comment to address the meaning of the words "lawful investigative activities" as it appears in the rule.

Should the full Committee disagree with the subcommittee's recommendation not to add a comment, the subcommittee has prepared language for a proposed comment to Rule 8.4(c).

II. BACKGROUND

In September, 2017, the Colorado Supreme Court conducted a public hearing on proposed amendments to the language of Rule 8.4(c) and subsequently adopted the proposed amendments to that rule which now reads 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;

III. NO COMMENT NEEDED

At each meeting of the subcommittee, a preliminary vote was taken on whether the subcommittee felt a comment was needed. The majority of the subcommittee voted for no comment each time such a vote was taken. Some of the reasons articulated for the belief that no comment is needed are as follows:

1. The Supreme Court's original notification of proposed amendments to Rule 8.4(c) listed only proposed language changes to the Rule itself and did not propose any comment to the Rule.

2. After its announcement of proposed amendments to Rule 8.4(c) and prior to the public hearing on the proposed amendments, the Supreme Court did not propose any comments to accompany the proposed rule changes or request any assistance of the Standing Committee to consider any proposed comments.

3. The recorded proceedings from the September, 2017 public hearing on the proposed amendments to the Rule do not indicate any concern by the Supreme Court of the need for a comment to accompany the proposed language changes to Rule 8.4(c).

4. The amended language of Rule 8.4(c) is relatively new. Many on the subcommittee suggested that adoption of comment language be delayed until issues with the amended language of the Rule have arisen and dictate the need for a comment.

5. Subcommittee members noted that the Final Report Of Pretexing Subcommittee dated December 19, 2011 did contain some proposed comment language.

6. Subcommittee members also noted that the Ethics Committee of the Colorado Bar Association is working on a proposed opinion addressing the amended language of Rule 8.4 (c).

IV. PROPOSED COMMENT

Notwithstanding the subcommittee's opinion that a comment is not needed, the subcommittee nevertheless continued its work and developed a proposed comment for the full Committee's consideration. The subcommittee's guide in drafting a proposed comment was that the comment should be brief and reiterate that the exception in Rule 8.4(c) does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit, or misrepresentation.

The subcommittee ultimately agreed on the following language:

PROPOSED COMMENT TO RPC 8.4(c)

> The exception in Rule 8.4(c) allowing advice, direction or supervision does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit, or misrepresentation. Conduct that is "lawful" could, if engaged in by a lawyer directly, also violate other rules, such as Rule 4.1 (Truthfulness in Statements to Others). What is "lawful" is determined on a case-by-case basis by reference to other law, including constitutional principles, legislation, and the common law.

V. CONCLUSION

The Rule 8.4(c) Comment subcommittee does not recommend the adoption of a comment to the rule addressing the phrase "lawful investigative activities". Should the Committee disagree with the subcommittee's recommendation and wish to adopt a comment, the subcommittee recommends that any such comment be brief and reiterate that the exception to Rule 8.4(c) does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit or misrepresentation.

Respectfully Submitted,

Thomas E. Downey, Jr.